

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

NO. **78-11**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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FREDONIA BROADCASTING CORP., INC.,  
*Petitioner*

v.

RCA CORPORATION,  
*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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The petitioner, Fredonia Broadcasting Corp., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 8, 1978.

**I.**

**OPINIONS OF THE COURTS BELOW**

The opinion of the court below is reported in 569 F.2d 251. The opinion is printed in Appendix A. A related opinion in this same case is reported at 481 F.2d 781 (5th Cir. 1973) see Appendix B.

## II.

**STATEMENT OF JURISDICTION**

The judgment of the court below was entered on March 8, 1978 (Appendix A). Petitioner's motion for rehearing and for rehearing en banc was denied on April 7, 1978, 572 F.2d 320.

This Court has jurisdiction of this application for the writ of certiorari pursuant to 28 USCA § 1254(1).

## III.

**QUESTIONS PRESENTED FOR REVIEW**

A. Whether a district judge must be disqualified as a matter of law by an appellate court in a situation in which a former law clerk — who had worked on the case while law clerk during the first trial and had subsequently joined the law firm representing one of the parties prior to the second trial in the same case — had withdrawn from all participation as counsel for such party prior to the second trial; and whether such action by the appellate court, in disqualifying the district judge without a hearing, contravenes 28 USCA § 144 and the Fifth and Fourteenth Amendments to the United States Constitution.

B. Whether a district judge can be disqualified as a matter of law by an appellate court in a situation in which the party subsequently complaining on appeal has specifically advised the district judge prior to trial that the judge is not disqualified, and in which the record fails to disclose any evidence of actual lack of impartiality or integrity on the part of the district judge or any other grounds for disqualification; and whether such action by the appellate court in disqualifying the district judge

without a hearing, contravenes 28 USCA § 144 and the Fifth and Fourteenth Amendments to the United States Constitution.

C. Whether reversal of the trial court's judgment entered pursuant to a jury verdict is proper under circumstances in which there is no holding whatsoever by the appellate court that the errors, if any, in the court's charge were harmful, or that the errors, if any, resulted in an erroneous verdict.

D. Whether the action of the appellate panel in disqualifying the district judge in the absence of observance of the statutory procedure and in the absence of observance of any other orderly process of law has "so far departed from the accepted and usual cause of judicial proceedings . . . as to call for an exercise of this court's power of supervision," pursuant to Rule 19, of the Rules of the United States Supreme Court.

## IV.

**CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED**

A. Fifth Amendment to the United States Constitution, see Appendix C.

B. Fourteenth Amendment to the United States Constitution, see Appendix D.

C. 28 United States Code Annotated, Section 144, see Appendix E.

D. Rule 7 of the Rules of the United States Supreme Court, see Appendix F.

E. Rule 19 of the Rules of the United States Supreme Court, see Appendix G.

## V.

## STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance is diversity of citizenship pursuant to 28 USCA § 1332.

The opinion of the court below accurately summarized the procedural aspects of the case. RCA Corporation (RCA) entered into a contract with Fredonia Broadcasting Corporation (Fredonia) to sell to Fredonia UHF color television broadcasting equipment for the operation of a television station in Lufkin, Texas. This station began broadcasting on July 30, 1969, and ceased operation on March 18, 1970. Fredonia then sued RCA for fraud, for breach of warranty, seeking actual and exemplary damages totalling \$2,650,000. RCA counterclaimed for \$506,333.80, the amount not yet paid for the equipment, plus interest and attorneys' fees. In the *first* trial, the jury, in a special verdict, found in favor of Fredonia and awarded \$850,000 in actual damages and \$150,000 in exemplary damages. As for the counterclaim, the jury's response to the court's question required the court to enter judgment in favor of Fredonia.

RCA appealed, claiming error in the trial court's treatment of both the liability and the damages issues involved in Fredonia's claims. RCA also asserted that the district court erred in not granting it a directed verdict on the counterclaim. A panel of the Fifth Circuit found reversible error in the instructions under which the district court had submitted Fredonia's claim of fraud to the jury and remanded the case for a new trial. The panel also set aside Fredonia's judgment on the counterclaim.

On remand, Fredonia, following pretrial conferences in which the liability issues were narrowed, proceeded to trial the *second* time on its claim of fraud. The jury again found for Fredonia, awarding \$1,000,000 in actual damages and \$750,000 in exemplary damages. On RCA's counterclaim, the court awarded \$511,182.11, the amount due for the equipment on the date of Fredonia's default in payment and the costs awarded on the first appeal.

On appeal from the second trial, a panel of the Fifth Circuit again reversed the trial court, holding this time that the trial judge should have disqualified himself. The conclusion was apparently reached based on "findings of fact" made by the appellate panel, even though no motion for disqualification of the trial judge, pursuant to the required statutory procedure, was ever made by any party at any stage in the proceedings.

## VI.

## ARGUMENT

A party seeking the recusal of a district judge is obliged to follow the statute governing such procedure. Section 144 of 28 USCA provides as follows:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall

be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

The Respondent RCA did not at any time file an affidavit pursuant to this procedure, and never at any time requested permission to do so. Despite the absence of any hearing before another judge, and despite the lack of any affidavit from the Respondent RCA raising the matter of any disqualification, the Court of Appeals proceeded to make the following "findings:"

(a) "No matter how many assurances were given by Fredonia's counsel that the former law clerk would withdraw from the case, we think it clear that the propriety of continuing the proceedings before this district judge had been irrevocably tainted, and the impartiality of the judge had been reasonably questioned." (p. 2596)

(b) "What is offensive here is that the district judge seemed to countenance the notion that the law clerk could improperly use the specific knowledge gained from working with him on this particular case." (p. 2597)

(c) "When, as here, a judge is confronted with a situation where the appearance of impropriety is already established, a taint on the judicial system remains as long as he presides over the case." (p. 2598)

(d) "Because of the nature of the judge-law clerk relationship, this trial judge invited serious questions to his impartiality when he refused to recuse himself." (p. 2598)

(e) "We hold that a reasonable man, viewing the facts as they stood at the time of RCA's motion, would reasonably question this trial judge's impartiality and the integrity of the judicial system." (p. 2598)

In order to put in perspective the decision facing the trial judge and the subsequent handling of that matter by the appellate panel, the following points should be observed:

First, the only motion filed by RCA concerning disqualification was a motion directed to the disqualification of the former law clerk or the law firm, and there was no motion specifically directed to the disqualification of the district judge. (Record at 289-90)

Second, counsel for RCA not only did not direct its motion to disqualification of the district judge, he specifically stated on the record that the district judge was not disqualified and specifically advised the district judge that in his view, and in the view of his client, the district judge was not disqualified. Counsel for RCA specifically advised the district judge as follows:

"RCA Corporation, the Defendant in this action, Your Honor, moves for a declaration of disqualification of Jamail and Gano to continue as Counsel in the Fredonia case before the present Court. I would like to say, Your Honor, that the motion is directed to a disqualification of the firm of Counsel for the Plaintiff in this case and not a disqualification of the Court. *I don't believe that the Court is disqualified in this case at all.*" (emphasis added) (Record at 289-90)

"I suggested earlier this morning during our informal discussions that — *not that this Court is in*

*any way disqualified and not that RCA Corporation nor I as its Counsel has any question about the fairness of this Court or any question of propriety on the part of this Court, but that a solution to the problem would be the referral of this case to another judge of Jamail and Gano and Mr. Stein desire to continue as Counsel in the case, . . . ."* (emphasis added) (Record at 294)

Third, although one alternative to remedying the disqualification of the law clerk or law firm suggested by counsel for RCA was the recusal of the district judge, the only rules or guidelines cited by counsel for RCA to the district judge, and the only rules specifically in point relied upon by the appellate panel in its decision, are the rules pertaining to the disqualification of the law clerk, and such rules in no way compel the conclusion under the circumstances involved that either the law firm or the district judge must be disqualified.

If the appellate panel is correct, and the Petitioner submits that it is not, the *only* remedy to be invoked in the future will be recusal of the judge. This Court can easily take judicial notice of the havoc that will follow in the Southern District of Texas, Houston Division, or in any other district with a large population and numerous district judges. As each of two law clerks takes leave of one of the eight or more district judges currently handling a Houston Division docket, he will have to advise the firm he joins of all cases he was handling as law clerk. If he joins a large firm with a substantial federal practice, the firm will immediately be disqualified from representing any clients involved in those cases before that particular judge. That judge will then recuse himself from those cases and reassign them to another judge. This process

will then have to be repeated every year for each of two law clerks for each of eight judges with respect to all cases involved at the time of the clerk's departure. Judge Justices' solution, as approved by the local rules of the Supreme Court and the First Circuit, would appear to be the better solution: withdrawal of participation by the former law clerk, and not disqualification of the law firm and trial judge.

Fourth, if counsel for RCA at any time reached the conclusion, contrary to its assertions made in open court and quoted above, that the district judge was in any way biased or prejudiced, he could have filed an affidavit specifically bringing this matter to the attention of the district judge, pursuant to 28 USCA § 144. This procedure, requiring a hearing by a different district judge, would have clearly brought to the attention of the trial judge in question that it was in fact his disqualification, and not the disqualification of the law clerk or law firm, that was being raised by counsel for RCA.

Finally, the district judge in his order pertaining to RCA's motion for disqualification specifically acknowledged that the former law clerk would no longer appear as counsel for the Petitioner, and specifically acknowledged not only the absence of any rule concerning such situation in the Fifth Circuit, but the relevance as well of the rules concerning such situation in the Supreme Court (see Appendix F) and First Circuit.

With respect to "findings" (a), (c), (d), and (e) quoted from the appellate panel opinion above, the appellate court presumably finds as fact and holds as a matter of law that the impartiality and the integrity of the district judge had been reasonably questioned.

Although the appellate panel has obviously arrived at a different conclusion from that of the district judge as to the appropriate manner in which any impropriety, if it did exist, should have been cured — i.e., recusal of the judge rather than withdrawal of the law clerk — the language employed by the appellate panel in reaching its conclusion is calculated not to question the district judge's judgment, but his integrity. No lawyer involved in this litigation has ever contended, and there is no evidence in the record, that the district judge was actually engaged in actions that compromised his integrity. The case was tried to a jury; there were no facts for him to find. The judge was called upon only to make rulings on the law. There was no evidence whatsoever that this district judge made his decisions on the law based on any reasons other than reasons that were honorable. The reversal of this judgment entered pursuant to a jury verdict on the mere speculation, outside the record, as to the lack of integrity or impartiality on the part of the trial judge, without relying on any actual showing in the record, or without requiring at a minimum that the district judge be confronted directly with such allegations, if any exist, by way of affidavit pursuant to the procedures anticipated in 28 USCA § 144, is an abuse of the prerogative of the appellate panel of the highest order. Such action by the appellate panel violates the Petitioner's right to a fundamentally fair trial pursuant to statute and pursuant to the Fifth and Fourteenth Amendments.

With respect to "finding" (b) quoted above, the appellate panel finds as fact that the district judge "seemed to countenance the notion that the law clerk could improperly use the specific knowledge gained from working with him on this particular case." (p. 2597) There

is absolutely no evidence, and there is in fact no contention made by counsel for RCA, that the former law clerk ever engaged in any improper action, or that the district judge countenanced such behavior after the time the matter was first brought to his attention. The record clearly discloses that when the potential conflict was first brought to the attention of the district judge on April 1, 1974, the district judge in fact encouraged counsel for RCA to put everything on the record concerning the entire matter of disqualification. (Record at 289) After the motion was heard, the former law clerk withdrew from any further participation in the case, and counsel for RCA never contended at any time that the former law clerk had engaged in any improper conduct. Counsel for RCA advised the court as follows:

"We do not know of any impropriety on Mr. Stein's part. If there has been any such, we are completely unaware of it." (Record at 292)

More importantly, although the district judge wrote the former law clerk after he had resumed his new duties with the law firm for the Petitioner in this cause, there is absolutely no evidence, and certainly no contention made by counsel for RCA, that of the hundreds of cases handled by a district judge during any given year, he had any recollection that this particular law clerk had worked on this particular case at the time he first directed a letter to him. The former law clerk may have recalled that he had worked on the case; but to assume as a matter of law that the district judge should have also recalled this former law clerk's association in this particular case is unrealistic and is grossly unfair to the district judge. As the record clearly reflects, the participation of

the former law clerk involved only rather insignificant correspondence regarding the setting of a hearing, and the former law clerk withdrew from any further participation in this case once the matter had been raised at the hearing by counsel for RCA. Counsel for RCA never did thereafter bring directly to the attention of the district judge by way of the procedure provided in 28 USCA § 144 that it was in fact the disqualification of the district judge it was seeking, and not the disqualification of either the law clerk or the law firm.

With respect to the appellate panel's opinion concerning "The Remaining Element of the Fraud Claim" and "The Proper Measure of Damages," there is no holding by the court that the errors, if any, in the court's charge were harmful or that the errors, if any, resulted in an erroneous verdict. The Petitioner, Fredonia Broadcasting Corporation, Inc., respectfully submits that the charge was not erroneous, that it was correctly based on the opinion of this court in the prior panel's decision, *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973), and that if there were any errors in such charge, they were not harmful and did not result in an erroneous verdict.

WHEREFORE, PREMISES CONSIDERED, the Petitioner prays that its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be in all things granted; that the decision of such appellate court be reversed and the decision of the district court be in all things reinstated and affirmed; and that

this Court grant such other and further relief to which Petitioner may show itself justly entitled.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to opposing counsel on this \_\_\_\_ day of \_\_\_\_\_, 1978, by certified mail, return receipt requested.

\_\_\_\_\_

**APPENDIX A**

**OPINION OF COURT OF APPEALS; March 8, 1978**

**FREDONIA BROADCASTING CORPORATION,  
INC.,**

Plaintiff-Appellee,

v.

**RCA CORPORATION,  
Defendant-Appellant.**

No. 75-2702.

United States Court of Appeals,  
Fifth Circuit.

Action was brought by television station against seller of broadcast equipment to recover damages arising out of contract to purchase such equipment, and seller counter-claimed for balance due on the equipment plus interest and attorneys' fees. Following remand, 481 F.2d 781, judgment was entered in the United States District Court for the Eastern District of Texas, at Tyler, William Wayne Justice, J., in favor of plaintiff for actual and exemplary damages, and in favor of defendant on the counter-claim in the amount due for the equipment on the date of the default, and defendant seller appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) once it appeared that plaintiff might have an unfair advantage in litigation because counsel included lawyer who had been law clerk for the trial judge during the first trial of the case, the trial judge had no alternative to disqualifying himself; (2) this would not preclude law firm repre-

senting plaintiff from continuing to serve as counsel before another district judge; (3) in order to recover exemplary damages plaintiff would have to prove at new trial that when seller made representation about the equipment, it knew they were false and made them "recklessly" without any knowledge of their truth; (4) plaintiff's compensatory damages, if otherwise recoverable, should be limited to actual damages and certain consequential damages, but not lost profits or sum spent to purchase replacement equipment, and (5) seller had not waived interest claim.

Reversed and remanded on plaintiff's fraud claim and vacated and remanded on defendant's interest claim.

Appeal from the United States District Court for the Eastern District of Texas.

Before TJOFLAT and HILL, Circuit Judges, and MAHON\*, District Judge.

TJOFLAT, Circuit Judge.

This diversity case is before us for the second time. Briefly, RCA Corporation (RCA) entered into a contract with Fredonia Broadcasting Corporation (Fredonia) to sell to Fredonia UHF color television broadcasting equipment for the operation of a television station in Lufkin, Texas. This station began broadcasting on July 30, 1969, and ceased operation on March 18, 1970. Fredonia then sued RCA for fraud, for breach of the sales contract, and for breach of warranty, seeking actual and exemplary damages totalling \$2,650,000. RCA counterclaimed for \$506,333.80, the amount not yet paid for the equipment,

\* District Judge of the Northern District of Texas, sitting by designation.

plus interest and attorneys' fees. The jury, in a special verdict,<sup>1</sup> found in favor of Fredonia and awarded \$850,000 in actual damages and \$50,000 in exemplary damages. As for the counterclaim, the jury's response to the court's questions required the court to enter judgment in favor of Fredonia.

RCA appealed, claiming error in the trial court's treatment of both the liability and the damages issues involved in Fredonia's claims. RCA also asserted that the district court erred in not granting it a directed verdict on the counterclaim. A panel of this court found reversible error in the instructions under which the district court had submitted Fredonia's claim of fraud to the jury and remanded the case for a new trial.<sup>2</sup> The panel also set aside Fredonia's judgment on the counterclaim.<sup>3</sup>

1. Fed. R. Civ. P. 49(a). The questions propounded to the jury can be found in the appendix to the opinion in the prior appeal. *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 481 F.2d 781, 806-11 (5th Cir. 1973).

2. The panel also found that many of the issues raised by Fredonia's multiple theories of recovery had been correctly resolved against Fredonia. To paraphrase the prior panel's holding, 481 F.2d at 805-806: (1) Fredonia's breach of contract claims were precluded by the terms of the contract, which the jury found Fredonia had affirmed; (2) Fredonia's breach of warranty claim was foreclosed unless the district court found on remand that the contract terms were unconscionable; (3) Fredonia's claims of misrepresentation as to date of delivery and degree of supervision were negated by the jury's finding that Fredonia's reliance upon RCA's misrepresentations was not justified; (4) Fredonia's claim of misrepresentation as to the merchantability of the equipment stands. The prior panel determined that Fredonia could not seek damages for lost profits under Texas law. Because Fredonia's fraud claims stand independently of its precluded contract claims, the case was remanded to the district court for determinations of the actual damages from the fraud and the availability of exemplary damages.

3. The merits of RCA's counterclaim were submitted to the jury in the form of one issue, raised by Fredonia's defense to the counter-

On remand, Fredonia, following pretrial conferences in which the liability issues were narrowed, proceeded to trial on its claim of fraud. The jury again found for Fredonia, awarding \$1,000,000 in actual damages and \$750,000 in exemplary damages. On RCA's counterclaim, the court awarded \$511,182.11, the amount due for the equipment on the date of Fredonia's default in payment and the costs awarded on the first appeal. In this second appeal, RCA seeks reversal of the judgment against it on two principal grounds. The first stems from the trial judge's disposition of RCA's pretrial motion for disqualification of either Fredonia's counsel or the trial judge from further involvement in the case. The second concerns, once again, the judge's instructions to the jury on damages. With respect to the counterclaim, RCA asserts error in the court's failure to include in the judgment an amount representing the interest accumulated on the balance due on the equipment.<sup>4</sup>

# I

The principal issue in this appeal involves the trial judge's course of action when faced with RCA's oral motion, made at a pretrial hearing on April 1, 1974, for the disqualification of either Fredonia's counsel or the judge. That motion formally brought to the trial judge's

claim. That issue was whether RCA had coerced Fredonia into executing the sales agreement and accompanying promissory notes. The panel found the evidence to be insufficient to support that defense and thus concluded that the trial court had erred in not summarily resolving the issue in favor of RCA.

4. The indebtedness due on the equipment was evidenced by several promissory notes. These notes, the validity of which are no longer in contest, expressly provide for interest from the date of default.

attention the appearance of impropriety created by the participation in the case of one of his former law clerks, an associate in the law firm representing Fredonia. Apparently, the judge had already known of the former law clerk's association with Fredonia's counsel because the judge had previously written to him and RCA's counsel of record about a pending pretrial matter. The former law clerk was present at the April 1 hearing. During the hearing, it was pointed out that he had been on the judge's staff during the first trial of the action. RCA suggested that the former law clerk had therefore acquired intimate knowledge of the case and of the judge's inclinations about the issues involved. RCA's counsel consequently questioned the propriety of allowing the case to go forward without the withdrawal from the case of either the trial judge or Fredonia's counsel.

On April 26, 1974, the district judge denied RCA's motion. In its order denying the motion, the court acknowledged that the former law clerk, had, as law clerk, "worked on the case when it was tried for the first time" and that he had "participated in the recent proceedings in the case," but was of the opinion that this was not a sufficient ground to disqualify Fredonia's counsel from further participation in the case. The order also recited that the former law clerk, according to Fredonia's counsel, would "participate no further in this case." The court thus determined that the recusal of the trial judge would serve no useful purpose.

[1] In deciding not to disqualify Fredonia's counsel, the district judge considered the ethical canons and the rules promulgated by the Supreme Court and the Court

of Appeals for the First Circuit.<sup>5</sup> Although these rules explicitly forbid a former law clerk from participating in a case which was pending before the court during his term of service, the district judge found the absence in this Circuit of a formal rule of that nature to be important. This was an erroneous assumption by the district judge. These rules are express safeguards of the integrity of the judicial process, a concern of all courts. The district judge correctly noted that the canons and rules do not require disqualification of an entire law firm when the propriety of a former law clerk's participation in a case is drawn in question. Under the facts presented

5. The Code of Professional Responsibility provides as follows:

A lawyer should avoid even the appearance of impropriety. ABA, Code of Professional Responsibility, Canon 9.

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

ABA, Code of Professional Responsibility, DR 9-101(B).

The rules of the Supreme Court of the United States provide as follows:

No one serving as a law clerk or secretary to a justice of this court shall practice as an attorney or counsellor in any court or before any agency of government while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court until two years have elapsed since such separation; *nor shall he ever participate, by way of any form of professional consultation and assistance, in any case that was pending in this court during the period that he held such position.*

Rules of the United States Supreme Court, Rule 7 (emphasis added).

The Courts of Appeals of the First Circuit and the District of Columbia have similar rules. The appendix to RCA's brief to this court, containing correspondence from the clerks of the United States Court of Appeals for the Tenth Circuit and various federal district courts, indicates that numerous federal courts follow the practice outlined in the Supreme Court's rule although they have not promulgated a formal rule. Brief of Appellant at A. 2 through 19. Fredonia does not dispute these representations.

in this case, however, we need not delve into the problems involved in disqualifying a party's counsel.

[2] The question here centers instead on the disqualification of the trial judge. Once it appeared that Fredonia might have an unfair advantage in the litigation because its counsel included a lawyer who had been exposed to the trial judge's innermost thoughts about the case, the trial judge had no alternative to disqualifying himself. No matter how many assurances were given by Fredonia's counsel that the former law clerk would withdraw from the case, we think it clear that the propriety of continuing the proceedings before this district judge had been irrevocably tainted, and the impartiality of the judge had been reasonably questioned.

In order fully to appreciate the role of a law clerk and to evaluate the taint of impropriety that occurred in this case, we consider it appropriate to note briefly the role of law clerks in our judicial system. Historically, the practice of employing federal judicial law clerks began in 1882 when Justice Horace Gray was appointed to the Supreme Court. Justice Oliver Wendell Holmes, who continued this practice when he succeeded Justice Gray, termed law clerks "puisne judges." Congress has provided that "district judges may appoint necessary law clerks." 28 U.S.C. § 752 (1970). The law clerk has no statutorily defined duties but rather performs a broad range of functions to assist his judge. A judicial clerkship provides the fledgling lawyer insight into the law, the judicial process, and the legal practice. The association with law clerks is also valuable to the judge; in addition to relieving him of many clerical and administrative chores, law clerks may serve as sounding boards for ideas,

often affording a different perspective, may perform research, and may aid in drafting memoranda, orders and opinions.<sup>6</sup>

This general knowledge and experience is an invaluable asset to the law clerk and his subsequent utilization of the knowledge is to be encouraged. *See generally* K. Llewellyn, *The Common Law Tradition: Deciding Appeals*, 321-23 (1960). A law clerk, by virtue of his position, is obviously privy to his judge's thoughts in a way that the parties cannot be. We are not holding that a former law clerk may never practice before the judge for whom he clerked. Such a holding would clearly be unwarranted and would cast an undue burden on the law clerk. Moreover, it would hinder the courts in securing the best qualified people to serve as law clerks. What is offensive here is that the district judge seemed to countenance the notion that the law clerk could improperly use the specific knowledge gained from working with him on this particular case. The impartiality of a trial judge is seriously open to question when the judge refuses to recuse himself after being made aware that his former law clerk is actively involved as counsel for a party in a case in which the law clerk participated during his clerkship.

In addition to the possibility that Fredonia might have an unfair advantage because of its counsel's former association with the trial judge, we are concerned with the

6. We note, as did RCA in its brief to this court, that the problem is exacerbated under the facts here, where the prior remand was based on trial court error in fashioning the law in this case. Although the record does not disclose which facets of the first trial were participated in by the former law clerk, one could readily infer that he had been involved in drafting the jury instructions which the prior panel found to be erroneous.

"purity of the judicial process and its institutions." *Kin-near-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437, 439-40 (5th Cir. 1968), *cert. denied*, 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971). The Supreme Court has repeatedly stated that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954); *accord*, *In re Marchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). The Code of Judicial Conduct for United States Judges, approved by the Judicial Conference of the United States, expresses concern that the judicial system be protected from the appearance of impropriety in the eyes of both the parties and the general public.

A judge should avoid impropriety and the appearance of impropriety in all his activities.

A. A judge . . . should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Code of Judicial Conduct for United States Judges, Canon 2 & 2 A. The Commentary to Canon 2 states that

[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety.

When, as here, a judge is confronted with a situation where the appearance of impropriety is already established, a taint on the judicial system remains as long as he presides over the case. This court, moreover,

through the exercise of our supervisory powers, can prohibit any practice which threatens the judicial process and its integrity. *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109-10 (5th Cir. 1974).

Because of the nature of the judge-law clerk relationship, this trial judge invited serious questions to his impartiality when he refused to recuse himself. Congress, in amending the statutory provision for the disqualification of judges, adopted the language proposed in the American Bar Association's Canons for Judicial Conduct 3C(1)<sup>7</sup> with the exception of making the disqualification mandatory by substituting the word "shall" for the ABA's "should."<sup>8</sup> The statute provides, in part, "A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (Supp. 1977). We have held this statutory provision to be applicable in cases where, as here, the effective date of the statute was after the commencement of the trial but prior to the full submission of the issue on appeal. *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98, 102 (5th Cir. 1975) (en banc); *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).<sup>9</sup>

7. In amending 28 U.S.C. § 455, Congress also intended to codify the standards of Canon 2, discussed *supra* in the text. See *Overseas Private Inv. Corp. v. Anaconda Co.*, 418 F.Supp. 107, 111 n. 6 (D.D.C. 1976).

8. The Code of Judicial Conduct for United States Judges, approved by the Judicial Conference of the United States, also employs the mandatory standard for disqualification. Code of Judicial Conduct for United States Judges, Canon 3 C.

9. Even under the standards in effect at the time the district judge refused to recuse himself, we would reach the same result.

Section 455(a) is a general safeguard of the appearance of impartiality and establishes a "reasonable factual basis — reasonable man" standard. *Parrish*, 524 F.2d at 103. We hold that a reasonable man, viewing the facts as they stood at the time of RCA's motion, would reasonably question this trial judge's impartiality and the integrity of the judicial system. The district judge could not remain in the case. Consequently, we find that we must remand this case once again, this time for a trial before a different judge.

[3] We note here that nothing in the record before us would preclude the law firm representing Fredonia from continuing to serve as counsel before another district judge. Disqualification of counsel is a drastic measure and conceivably could have due process implications, especially when counsel has served throughout proceedings as involved and lengthy as these and the client's investment in legal representation is substantial.

## II

The record of the second trial discloses some confusion concerning the effect of the prior panel opinion. For the

The old standard, 28 U.S.C. § 455 (1970) (prior to the 1974 amendment), left the decision whether recusal was required to the discretion of the judge. In this circuit, there was a presumption against disqualification. See, *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000, 85 S.Ct. 721, 13 L.Ed.2d 702 (1965) (judges have a "duty to sit"). Although few district judges were reversed under the old standard, an appellate court always has the inherent power to promote justice by holding improper a trial judge's failure to disqualify himself, *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965), *cert. denied*, 383 U.S. 936, 86 S.Ct. 1066, 15 L.Ed.2d 853 (1966), and an appellate court could reverse for an abuse of discretion. See Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 740 (1973).

benefit of the parties and the court on remand, and to expedite the anticipated third trial, we shall set forth what must be determined on remand. For the sake of clarity, we will discuss the element of Fredonia's fraud claim remaining to be tried; then we will address the proper measure of damages. In many respects these matters are intertwined.

#### A. The Remaining Element of the Fraud Claim.

Following the remand of this case for a new trial, Fredonia amended its complaint, thus modifying its theory of recovery. By the conclusion of the final pretrial hearing, the liability issues had been narrowed to a claim of fraud, that RCA had misrepresented the merchantability of the equipment sold to Fredonia. The nature of this claim under Texas law requires further explication.

[4] The prior panel opinion held that Fredonia's claims of fraud were independent of its contract claims and that the jury's finding that RCA had misrepresented the merchantability of its equipment was valid. The type of fraud at issue in this case is fraud in the inducement to contract. Two categories of fraudulent inducement to contract are recognized in Texas: (1) "misrepresentation" of a past or existing fact, sometimes called "false statement" and (2) "false promise," which may be described as an intentional tort and is sometimes simply termed "fraud." *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 516 S.W.2d 138, 142-43 (Tex. 1974) (adopting the Restatement of Restitution § 8, *Fraud and Misrepresentation* (1957) ); *International Harvester Co. v. Kesey*, 487 S.W.2d 799, 803 (Tex.Civ.App.—El Paso 1972), *rev'd on other grounds*, 507 S.W.2d 195 (Tex. 1974).

[5] In order to recover damages for a claim of misrepresentation, it is necessary to show that a material misrepresentation was made, that the speaker made it with the intention that it should be acted upon by the plaintiff, and that the plaintiff acted in reliance upon it and thereby suffered some actual injury. *E. g.*, *Custom Leasing, Inc.*, 516 S.W.2d at 143; *Traylor v. Gray*, 547 S.W.2d 644, 650 (Tex.Civ.App.—Corpus Christi 1977). Fredonia has already proved this claim as to the merchantability of RCA's equipment. 481 F.2d at 795-96, 806. It was not necessary, in proving its case of misrepresentation, for Fredonia to show that RCA's representatives knew that the questioned representations were false when they made them. *See Baker v. Moody*, 219 F.2d 368, 371 (5th Cir. 1955); *Griffin v. Phillips*, 542 S.W.2d 432, 434 (Tex. Civ.App.—Eastland 1976, writ ref'd n.r.e.); *Custom Leasing, Inc.*, 516 S.W.2d at 144; *Success Motivation Institute, Inc. v. Lawlis*, 503 S.W.2d 864, 870 (Tex.Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

[6-8] Exemplary, or punitive damages cannot be recovered for simple misrepresentation or false statements; it is necessary to demonstrate the speaker's knowledge of the falsity of the representation to justify an award of such damages. *Baker*, 219 F.2d at 371; *Griffin*, 542 S.W.2d at 434; *Lawlis*, 503 S.W.2d at 870. Under Texas law, the mere failure to perform a promise is not itself any evidence of an intent not to perform. *Turner v. Briscoe*, 141 Tex. 197, 171 S.W.2d 118, 119 (1943); *Precision Motors v. Cornish*, 413 S.W.2d 752, 756 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.). It is this additional element that distinguishes misrepresentation, from the second category of fraudulent inducement to contract, "false promise." False promise is an intentional tort,

requiring proof of intent not to perform the promise at the time it was made. *McDaniel v. Pettigrew*, 536 S.W.2d 611, 616 (Tex.Civ.App.—Dallas 1976, writ ref'd n.r.e.). *Susanoil, Inc. v. Continental Oil Co.*, 519 S.W.2d 230, 236 (Tex.Civ.App.—San Antonio 1975, writ ref'd n.r.e.). Texas jurisprudence makes it clear that intent to defraud is the gist of the tort of false promise. *E. g.*, *Collins v. McCombs*, 511 S.W.2d 745, 747 (Tex.Civ.App.—San Antonio 1974, writ ref'd n.r.e.); *Susanoil, Inc.*, 519 S.W.2d at 236. Therefore, in order to recover exemplary damages Fredonia must prove at the new trial that when RCA made the representations about the equipment, RCA knew they were false or made them "recklessly"<sup>10</sup> without any knowledge of their truth; that is, that at the time RCA made them, RCA had the intent not to fulfill the promise. *Custom Leasing, Inc.*, 516 S.W.2d at 142-43; *Susanoil*, 519 S.W.2d at 235.<sup>11</sup>

10. In Texas "recklessly" indicates a higher standard than negligence in this context.

Even though the Court decisions and text writers use the word "reckless" in support of an award of exemplary damages, the measure of such conduct to support such an award must involve conduct of an unconscionable nature, such as, malice, fraud, oppression, bad faith, knowledge of the falsity, intention to defraud, conscious indifference or wanton disregard of the rights of others. . . .

*International Harvester Co. v. Kelsey*, 487 S.W.2d 799, 804-05 (Tex. Civ. App.—El Paso 1972, rev'd on other grounds, 507 S.W.2d 195 (Tex. 1974) (citations omitted).

11. The holding of the prior panel opinion is summarized in 481 F.2d at 805-06. The distinction between the two categories of fraudulent inducement to contract, that is misrepresentation and false promise with its additional element of intent, is implicit in this summary. Compare holding three with holding four, *id.* at 806. The panel stated that "Fredonia, on remand, can seek exemplary damages if fraud is proven." *Id.* (Emphasis added). Insofar as there are any statements in the prior opinion which are inconsistent with the holding, those statements cannot stand.

## B. The Proper Measure of Damages.

[9, 10] RCA correctly claims error in the trial court's instructions, in the second trial, on the measurement of damages. Because of the confusion that apparently exists on the part of both parties, we find it necessary to summarize the Texas law on damages in this type of suit. In Texas, the common law measure of damages, when the defrauded party has not sought rescission of the contract, is the value given for the goods less the fair market value of the goods received. *E. g.*, *Sobel v. Jenkins*, 477 S.W.2d 863, 868 (Tex. 1972); *Morriss-Buick v. Pondrom*, 131 Tex. 98, 113 S.W.2d 889, 890 (1938). *Traylor v. Gray*, 547 S.W.2d 644, 656 (Tex.Civ.App.—Corpus Christi 1977). Our review of Texas law shows that consequential damages are also recoverable in actions for fraud in the inducement to contract. *Success Motivation Institute, Inc. v. Lawlis*, 503 S.W.2d 864, 866 (Tex.Civ. App.—Houston (1st Dist.) 1973, writ ref'd n.r.e.); *El Paso Development Co. v. Ravel*, 339 S.W.2d 360, 363-64 (Tex.Civ.App.—El Paso 1960, writ ref'd n.r.e.). See also, *International Harvester Co. v. Kelsey*, 507 S.W.2d 195 (Tex. 1974), rev'd 487 S.W.2d 799 (Tex.Civ.App.—El Paso 1972).

[11, 12] On retrial Fredonia may therefore recover as consequential damages pecuniary losses that resulted directly, naturally, and proximately from the fraud. These losses must be ascertained with reasonable certainty and cannot represent fictitious, conjectural, speculative, or contingent values. As the prior panel held in its opinion, 481 F.2d at 802-04, Fredonia is not entitled to recover lost profits because "prospective profits from a new enterprise which has no history of profits are too remote

and speculative to be included in compensatory damages." *Id.* at 803 (quoting *Southwest Bank & Trust Co. v. Executive Sportsman Ass'n*, 477 S.W.2d 920, 929 (Tex. Civ.App.—Dallas 1972, writ ref'd n.r.e.)). Fredonia's damages, if otherwise recoverable, should be limited as follows:

(1) Actual damages for the unmerchantable RCA equipment, i. e., the amount Fredonia paid, or obligated itself to pay, for the equipment less the fair market value of that equipment.

(2) Fredonia cannot recover the sums spent to purchase from a different manufacturer items to replace the RCA equipment. To allow recovery for this expenditure, in addition to the actual damages relating to the unmerchantable equipment, would doubly compensate Fredonia.

(3) The proper measure of consequential damages for the loss of the FCC permit and the CBS affiliation is the money Fredonia expended to obtain them. Allowing Fredonia to recover their "value" is actually allowing recovery for lost profits. As discussed above, such profits would be purely speculative since Fredonia was never a going concern.

(4) RCA should not be held accountable for the entire cost of the television station structure, the wiring of the station, and the engineering fees to supervise the construction of the building. However, any sums spent by Fredonia to modify the building or wiring to accept replacement equipment obtained from other manufacturers are recoverable from RCA as consequential damages.

In addition to the actual and consequential damages we have outlined above, Fredonia may recover exemplary damages if Fredonia proves that RCA acted from the outset with the intent not to fulfill its promises. See part II A, *supra*.

### III

[13] With regard to the judgment on RCA's counterclaim, our examination of the record convinces us that the district court erred in determining as a matter of law that RCA had waived its claim to the interest by its procedural conduct at the second trial. The counterclaim and, therefore the interest, were not in issue at trial, and no reference during that proceeding to the debt due on the equipment could be deemed as a waiver by RCA of the interest stipulated in the notes. On remand, the district court must determine the merits of RCA's claim for the additional interest on the notes from the date of default.

This case is REVERSED and REMANDED for further proceedings, consistent with this opinion, on Fredonia's fraud claim. The judgment of the district court on RCA's counterclaim is VACATED and REMANDED for further proceedings on RCA's interest claim. It is further ordered that this case be assigned on remand to a different district judge for all further proceedings.

**APPENDIX B****OPINION OF COURT OF APPEALS; July 2, 1973**

**FREDONIA BROADCASTING CORPORATION, INC.,**  
Plaintiff-Appellee,

v.

**RCA CORPORATION,**  
Defendant-Appellant.

No. 72-2341.

United States Court of Appeals,  
Fifth Circuit.

July 2, 1973.

Rehearing Denied Nov. 2, 1973.

Action was brought by television station against seller of equipment to recover damages arising out of contract to purchase such equipment. The United States District Court for the Eastern District of Texas, at Tyler, William Wayne Justice, J., entered a judgment awarding damages to the buyer station and adverse to the seller on its counterclaim for damages and the seller appealed. The Court of Appeals, Coleman, Circuit Judge, held that the buyer's breach of contract claims were precluded by terms of contract which jury found that buyer had affirmed, instruction on repudiation was erroneous and that findings that seller made misrepresentations as to dates of delivery and degree of installation supervision were negated by jury's findings that reliance was not justified.

Reversed and remanded with instructions.

Gewin, Circuit Judge, filed an opinion concurring in the result.

James E. Coleman, Jr., Marvin S. Sloman, Earl F. Hale, Jr., Dallas, Tex., for defendant-appellant.

John Gano, Houston, Tex., Ben Johnson, Dallas, Tex., for plaintiff-appellee.

Before WISDOM, GEWIN and COLEMAN, Circuit Judges.

COLEMAN, Circuit Judge:

RCA contracted to sell UHF color television broadcasting equipment to Fredonia Broadcasting Corporation for the operation of television station, KAEC-TV, in Lufkin, Texas. The station was designated as Channel 19 and was to cover the Lufkin and Nacogdoches area. Fredonia's operation failed. The station began broadcasting on July 30, 1969, and ceased operation on March 18, 1970.

Fredonia sued<sup>1</sup> RCA for fraud, for breach of sales contract, and for breach of warranty. Fredonia sought actual and punitive damages in the total amount of \$2,650,000. RCA counterclaimed for \$605,493.80 for the value of the broadcasting equipment delivered.

The District Court submitted the case to the jury under Rule 49(a), Fed.R.Civ.P.<sup>2</sup> The jury was asked to answer

1. RCA properly removed the case to the United States District Court for the Eastern District of Texas under 28 U.S.C. § 1441.

2. Rule 49, Fed. R. Civ. P., states as follows:

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written

18 fact questions and two damages questions. The jury found in favor of Fredonia and awarded \$850,000 for actual damages and \$150,000 for exemplary damages.

finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

This case is under Rule 49(a) and not 49(b). The District Court erroneously called the "questions" under Rule 49(a) "interrogatories". In this opinion we shall use the term "question". All the "questions"

On Appeal, RCA raises numerous issues concerning the findings as to both liability and damages.

We reverse and remand for a new trial on both issues.

### THE FACTS

On January 15, 1969, RCA and several other suppliers of broadcast equipment made presentations to a committee of Fredonia's Board of Directors, composed of Dr. Basil Atkinson, chairman of the Board; Al Cudlipp, president; and Edward McFarland, attorney for Fredonia. William Carr, a consulting engineer for Fredonia, was also present. RCA's written proposal, titled Broadcast Equipment Proposal, was explained by its field salesman, George McClanathan, and by its area sales manager, Dana Pratt. At this meeting Fredonia did not make any final decision as to which supplier to choose, but decided to ask for another meeting with RCA.

Cudlipp called McClanathan and asked him to come to Lufkin for a final negotiation session. This meeting was held on February 6, 1969. Atkinson, Cudlipp, and McFarland were present on behalf of Fredonia.

At these meetings Fredonia claims that RCA made several oral representations which induced it to enter into a contract with RCA.

Fredonia claims that RCA represented (1) it would deliver the equipment in time for Fredonia to meet the on-the-

asked the jury by the District Court are set out fully in Appendix A. The term "interrogatory" is used in Appendix A to avoid confusion when there are cross-references. Throughout the remainder of this opinion all "questions" will not be footnoted and the reader is directed to refer to Appendix A.

Furthermore, in this case, no general verdict was requested of the jury or entered by it.

air date of June 1, 1969; (2) it would supervise the installation; and (3) it would deliver used and new equipment which would run and operate properly and would be suitable for the purposes for which it was intended. McFarland, Fredonia's attorney, testified that he relied on these representations in advising his client to enter into a contract with RCA. Cudlipp also testified that he relied on these representations.

These oral representations conflict with RCA's written broadcast proposal since that written proposal states: (1) RCA would not be liable in damages for delays in delivery and the buyer could cancel if delivery was not made within the date specified, (2) RCA would not assume responsibility for the installation and operation of equipment if the buyer requested RCA to furnish a representative to supervise the installation, and (3) RCA's warranty for the equipment would not include liability for damages of any kind connected with the use of the equipment or its failure to function properly. RCA's written broadcast proposal also states that:

[the] proposal including any modifications or additions agreed to in writing by the parties prior to acceptance by RCA expresses the entire understanding of the parties . . . and no agreement modifying or supplementing the terms of this proposal shall be valid unless in writing duly signed by the parties.

The evidence is conflicting as to whether RCA made misrepresentations as to the date of delivery, degree of supervision, and quality of the equipment and as to whether Fredonia relied on these misrepresentations. Both Cudlipp and McFarland testified that McClanathan

promised on February 6, 1969, that delivery could be arranged so that Fredonia could meet its air date of June 1, 1969. McClanathan and Pratt both knew that Fredonia was attempting to meet an air date of June 1, 1969. An internal memorandum of RCA, titled Contract Data Sheet, which informed RCA's internal organization of the expected air date, stated that the air date for the new station was estimated to be May 15, 1969. This document also stated that the required delivery date for studio equipment was April 1, 1969, and the required delivery date for the transmitter and the antenna was May 1, 1969.

Other evidence was to the contrary and showed that Fredonia did not expect to be on the air by June 1, 1969. William Carr, Fredonia's consulting engineer, testified for the defendant that he advised his client that July 1, 1969, was a reasonable air date. Carr also testified that Fredonia was delayed because Fredonia did not supply enough personnel to work at installing the equipment. The building to house the station's equipment was not completely finished on May 9, 1969. A letter from Fredonia's Washington attorneys to the FCC states that the anticipated air date was July 1, 1969. McClanathan's representations as to a delivery date can also be interpreted to mean that RCA would ship the equipment within 120 days of Fredonia's acceptance on February 6, 1969, and not that Fredonia would be on the air 120 days from February 6, 1969.

Finally, the evidence shows that permission to construct microwave towers, which were essential for the broadcasting of network programs, was not received until June 5, 1969.

There was evidence that RCA represented through its agents that it would supervise installation of the equipment, but there was also other evidence which showed that Fredonia intended to rely on Carr to supervise the installation. Carr testified that under the terms of his consulting contract he was to be responsible for the installation of the equipment. Correspondence between Carr and Cudlipp corroborates Carr's responsibility. Cudlipp also testified that RCA's Barbour did a lot of work Cudlipp expected Carr to do. Cudlipp also testified that he felt Carr was not at the station as often as he should have been.

While there was evidence to show that RCA represented to deliver operable and suitable equipment and did not do so, there was also evidence to show that Fredonia, itself, might have been at fault in causing the equipment not to operate. Barbour, an RCA employee, testified that when he arrived at the station on June 4, 1969, he found that there were errors made in the installation of the equipment. Barbour also testified that Fredonia experienced problems that were normally to be expected in the starting up of a television station. Other evidence showed that Cudlipp wrote a letter stating that he had a good operating crew, but that they were not very good in the maintenance of the equipment. RCA also introduced testimony that showed it had given Fredonia credit for two inoperable cameras that RCA had delivered. Finally, after RCA's Parker had conducted a proof of performance on the transmitter, Cudlipp wrote Barbour that for Fredonia he accepted the proof of performance. This evidence tended to show that RCA delivered operable equipment and that any breakdowns in broadcast transmission was the fault of Fredonia.

The parties disagree as to when a binding contract was made between the parties and disagree as to which documents constituted the contract.

At the February 6, 1969 meeting Fredonia was not satisfied with the exact written terms of RCA's written broadcast approval and requested three changes. McClanathan, RCA's salesman, said that while he did not have the authority to bind RCA to any revision, he could put Fredonia in touch by telephone with Edwin Tracy, RCA's Division Vice-President of Broadcast Sales, who had authority to accept and approve changes. The three changes Fredonia requested concerned (1) additions and deletions to the proposal, (2) freight charges, and (3) method of down-payment. Tracy agreed to these changes for RCA. RCA contends that these three changes were the only ones made to the written agreement.

McFarland at this meeting [according to his testimony] was concerned that RCA's broadcast proposal did not bind RCA. McFarland, therefore, prepared a letter of acceptance, dated February 6, 1969, which stated that Fredonia accepted RCA's broadcast proposal at a package price of \$471,967.00. Fredonia claims that the letter together with the broadcast proposal constitute the contract between the parties. This acceptance letter enumerated the three changes that Fredonia wanted RCA to make in the broadcast proposal.

The letter also stated specifically that a down-payment of 25% of the total price would be made. This 25% down-payment was to be paid in part as follows: (1) \$25,000 paid immediately, (2) \$50,000 paid on notification the transmitter was ready, and (3) the remainder paid thirty days thereafter. Fredonia sent to RCA's office at

Camden, New Jersey, the \$25,000 on February 6, 1969. RCA accepted the check and deposited it to its bank account. The February 6, 1969 acceptance letter also detailed the arrangement for the payment of notes to cover the balance of the amount due.

McFarland testified that it was agreed with Tracy that this acceptance letter consummated a contract between RCA and Fredonia. Tracy testified that an acceptance was not given since it was RCA's procedure that a contract would be made only when approved by RCA at its home office in Camden, New Jersey. Fredonia's reliance on the acceptance letter to form a binding contract conflicts with the procedure specified in RCA's broadcast proposal which states that the broadcast proposal "shall not be binding upon RCA until accepted by it in writing at Camden, New Jersey" and that "use [receipt] of a downpayment shall not constitute an acceptance". McFarland testified that he relied on Tracy's representation that a binding contract had been made.

McFarland admitted that he knew that RCA would require the signing of a conditional sales contract which would incorporate a security agreement. McFarland also testified that he felt that such an arrangement was provided for in the February 6, 1969, acceptance letter since that letter details an arrangement for the payment of notes. The broadcast proposal also anticipates that a conditional sales agreement will be entered into since it states that if the buyer desires deferred payment terms the buyer "agrees to arrange for RCA's standard form of deferred payment contract and related instruments to be signed prior to any shipment".

Cudlipp received the conditional sales agreement on April 14, 1969, and executed the agreement on April 20, 1969. RCA approved the Conditional Sales Agreement on April 28, 1969. RCA contends that only then was a final binding contract concluded between the parties. The terms of Conditional Sales Agreement are exactly the same as the January 15, 1969, broadcast proposal except that the later conditional sales agreement gives RCA a security interest in the equipment.

Fredonia contends that it was coerced into signing the conditional sales agreement because RCA would not ship any equipment until such an agreement was signed. The evidence shows that RCA withheld delivery until the conditional sales agreement was signed by Fredonia. An RCA interoffice memo verifies that no shipment was to be made until the conditional sales agreement was signed. No equipment was delivered until after the date Fredonia signed the conditional sales agreement. The first shipment of equipment was received at the end of April, 1969, and was not enough to get Fredonia on the air. It was only in the beginning of July, 1969, that enough equipment was received to put the station on the air.

Fredonia asserts that the delay in the shipment of the equipment caused Fredonia to miss its scheduled air date and thereby damaged Fredonia by the loss of advertising revenues.

Fredonia introduced into evidence also instances where RCA delivered defective equipment. Fredonia intended to show by such evidence that such inoperable equipment caused the station to broadcast on an intermittent basis and thereby lose advertising revenues.

The evidence showed that RCA did deliver three different cameras which were inoperable. RCA sent Fredonia a TK-42 camera, costing \$27,000, which John Barbour, an employee of RCA's project management department, testified was inoperable. The testimony of John Cassidy, RCA's Manager of Project Management and Administrative Services corroborates Barbour's account. RCA also sent Fredonia a TK-26 camera which Barbour admitted had been subject to cannibalization. An RCA internal memorandum showed that this camera was intended to be scrapped by RCA and not sold. A second internal RCA memorandum shows that RCA considered the TK-26 camera not fit for resale or refurbishing after Fredonia returned the camera to RCA. A TP-6 projector RCA sold Fredonia was also intended to be scrapped as shown by an RCA internal memorandum. RCA contends that the TK-26 camera and the TP-6 projector were repaired before the station went on the air and did not cause a delay.

Fredonia introduced other evidence to show that RCA delivered defective equipment. Barbour testified that a Klystron tube in the transmitter which was furnished by RCA operated at reduced power. A Klystron tube is a power source and produces a great increase in power sufficient to cause the antenna system to radiate. Reduction in power of the Klystron tube causes the area receiving the station's signal to be reduced. Barbour further testified that the de-icer on top of the television tower did not work properly. A malfunctioning de-icer requires the station to reduce its power because otherwise other equipment might be damaged. De-icers are used so that the station can always operate at maximum power. RCA also furnished a u-bend connector on the transmitter that

did not work and required replacement. Lee Roy Franklin an engineer for Fredonia, testified that the station could not broadcast on its second day of operation because of a shorted capacitor on the blower motor inside the transmitter. Franklin and another Fredonia engineer, James Kirkland, enumerated other instances when broadcast equipment broke down.

Cudlipp and McFarland repeatedly testified that the delay of the initial broadcast date and interruptions in broadcast service damaged the station because advertising revenues were lost. Employees of RCA who made representations as to dates RCA would deliver equipment and as to the quality of the equipment knew that delay as to the initial broadcast date and intermittent broadcast operation would cause Fredonia to be damaged. Fredonia never introduced evidence data showing exactly on what dates broadcasting service was interrupted so that advertising revenue was lost. Fredonia also never introduced any financial analysis to concretely detail advertising revenue that it allegedly lost. However, Norman Fischer, a broadcasting consultant, did testify as an expert witness for Fredonia. Over RCA's objection, Fischer gave his opinion as to the value of the station at various points in time as follows: (1) value of the station just before it went off the air taking in account its future potential—\$2,420,000; (2) value of the station just before it went off the air without taking into account its future potential—\$850,000; (3) value of the station just after it went off the air—\$525,000; and (4) value of the station just after it went off the air minus its CBS affiliation—\$450,000.

## THE LAW

I. *Breach of Contract*

[1] In its amended complaint Fredonia asserted three different theories.<sup>3</sup> of relief: fraud, breach of contract, and breach of warranty. Of course, under Rule 8(e), Fed.R.Civ.P., Fredonia may state as many claims as it has, regardless of their consistency. See Wright & Miller, Federal Practice and Procedure: Civil § 1283, pp. 373-375; Pulliam v. Gulf Lumber Co., 5 Cir. 1963, 312 F.2d 505, 507; and Breeding v. Massey, 8 Cir., 1967, 378 F.2d 171, 178.

In the answers to the questions submitted to it, the jury found that RCA breached the contract, breached its warranty as to representations about the equipment, and also committed fraud.

[2, 3] In general, a defrauded party has three general remedies as follows:

1. A right to damages for being led into the transaction;
2. Rescission of the fraudulent transaction and restoration of the situation which the parties occupied before the fraudulent transaction was entered into; and
3. Enforcement against the fraudulent person of the kind of bargain he represented that he was making.

3. Fredonia also raised repudiation of the contract in the pre-trial order. The jury found in Question No. 11 that RCA repudiated the contract. The jury's determination of repudiation is discussed *infra*.

Williston on Contracts, Third Edition, § 1523, pp. 606-607. The defrauded party cannot seek both to have the contract rescinded and at the same time sue on the contract for the damages resulting from the fraudulent transaction. Ringsby Truck Lines, Inc. v. Beardsley, 8 Cir., 1964, 331 F.2d 14, 17 and authorities cited therein, International Sec. Life Ins. Co. v. Finck, 475 S.W.2d 363 (Tex.Civ.App. 1971), Holley v. Corbell, 443 S.W.2d 63 (Tex.Civ.App. 1969), Dallas Farm Machinery Company v. Reaves, 158 Tex. 1, 307 S.W.2d 233, 238-239 (1957).

[4] However, at the same time a judgment for fraud and breach of contract can stand, Southwestern Packing Co. v. Cincinnati Butchers' S Company, 5 Cir., 1944, 139 F.2d 201, 203; Bankers Trust Company v. Pacific Employers Insurance Company, 9 Cir., 1960, 282 F.2d 106, 110; and International Sec. Life Ins. Co. v. Finck, *supra* 475 S.W.2d at 369. In Bankers Trust Co. v. Pacific Employers Insurance Co., *supra*, the Court said:

It is the law that one who has been fraudulently induced into a contract may elect to stand by that contract and sue for damages for the fraud. When this happens and the defrauding party also refused to perform the contract as it stands, he commits a second wrong, and a separate and distinct cause of action arises for the breach of contract. The same basic transaction gives rise to distinct and independent causes of action which may be consecutively pursued to satisfaction. "Thus, an action on a contract induced by fraud is not inconsistent with an action for damages for the deceit; \* \* \*." 18 Am. Jur. 139, El. of Rem. § 14 (1st ed. 1938). "A right of action on a contract and for fraud in inducing plaintiff to enter into such contract may exist at the same time, and a recovery on one of the causes

will not bar a subsequent action on the other." 50 C.J.S. Judgments § 676, p. 121 (1st ed. 1947). The courts of many states have recognized the rule that a suit on a contract and a suit for fraud in inducing the contract are two different causes of action with separate and consistent remedies. [Footnote omitted.]

*Id.* 282 F.2d at 110. See also *Falls Sand and Gravel Co. v. Western Concrete, Inc.*, 270 F.Supp. 495, 500 (D.Mont. 1967).

In the present case, by the very terms of the contract, Fredonia's breach of contract claims cannot stand; the contract precludes it.

The jury's answers to Questions Nos. 7 and 9 show how the jury viewed the contractual relationship of the parties.

[5] The jury found that a contract existed in Question No. 7<sup>4</sup> when it found that the "parties intended" that the defendant's proposal of January 15, 1969, coupled with the plaintiff's February 6, 1969, letter of acceptance, and the

4. The wording of Question No. 7 is unfortunately misleading. Question No. 7 states:

Do you find from a preponderance of the evidence that the parties intended that the defendant's proposal of January 15, 1969, coupled with the plaintiff's letter of acceptance of this proposal, dated February 6, 1969, and oral representations, if any, made to the plaintiff by the defendant, constituted the contract between the parties?

Answer "It did" or "It did not".

Question No. 7 starts out asking the jury what the parties *intended* to be the contract and concludes with the jury finding what *was* the contract. The finding of whether documents constitute a contract is a conclusion of law and not for the jury's fact finding determination. *Success Motivation Institute, Inc. v. Jamieson Film Co.*, 473 S.W.2d 275, 280 (Tex. Civ. App. 1971) and cases cited therein.

We see Question No. 7 as telling what the jury believed the parties *intended* the contract to be and not what the contract was.

oral representation made by the defendant to the plaintiff "constituted the contract between the parties".

[6] The jury further found in Question No. 9 that the defendant breached this contract by the following acts:

- (a) By deliberately withholding shipment to the plaintiff of the items of equipment contracted for more than 75 days after February 6, 1969, and thereafter until plaintiff completed documents submitted to it by the defendant?
- (b) By delivering such equipment contracted for on a delayed, erratic, and incomplete basis?
- (c) By delivering equipment that was not of a quality such as is generally sold in the market and suitable for that which it is intended or for the particular uses to which the goods were to be put?
- (d) By withholding personnel necessary to supervise the installation of equipment until after June 1, 1969, and in failing to maintain such supervisory personnel on the site, except on an intermittent and irregular basis?
- (e) By failing, after notice, if any, to correct or remedy any such condition, or repair or replace any such equipment?

The jury's answer to Question No. 7 that a contract existed between the parties and its answer to Question No. 9 that RCA breached the contract show that the jury believed Fredonia affirmed the contract it had been induced into by fraud.<sup>5</sup> In affirming the contract, Fredonia is bound by the contract terms as were set out in RCA's January 15, 1969, proposal. In that proposal, as we

5. The jury found RCA committed fraud in Questions No. 1, 2, and 3. These fraud claims are discussed *infra*.

have already discussed. RCA was absolved from any responsibility for late delivery, failure to supervise, and defective equipment.<sup>6</sup> Therefore, Fredonia's claims for breach of contract cannot stand.

6. The exact contract terms of the January 15, 1969, proposal limiting RCA's liability are as follows:

5. *Delivery.* (a) RCA will endeavor to meet the estimated delivery dates specified in this agreement (and as may be from time to time revised by mutual agreement) but shall not be liable in damages or otherwise, nor shall you be relieved of performance, because of delays in delivery; provided, however, that, except as may otherwise be stated in this agreement (including any revisions hereof), as to equipment items which have not been shipped to you within four (4) months after the estimated delivery dates applicable to such items, you shall have the right, provided RCA is notified in writing, to cancel any such items from this agreement to the extent that such items shall not have been shipped to you prior to RCA's receipt of the notice of cancellation. In the event of cancellation of any such items the contract price shall be reduced accordingly, except that if unit prices are not set out opposite the equipment items cancelled the reduction in contract price shall be as mutually agreed upon.

8. *Installation.* RCA will furnish you with an instruction book setting forth pertinent information relating to installation and operation of the equipment. RCA will at your request and subject to prior commitments, furnish a representative to supervise the installation of the equipment listed in Schedule A and to instruct your personnel in the adjustment and operation thereof. Unless otherwise provided in this proposal, charges for furnishing such representative shall be at the current per diem rate in effect at the time, plus transportation and reasonable living expenses, and shall be payable upon submission of invoices. Such supervisory service shall not include the furnishing or arranging for the furnishing of any equipment, materials or services required for the actual installation. You will assume complete responsibility for the installation and operation of the equipment including, adequately staffing your organization with technically qualified personnel, furnishing or arranging for the furnishing by others of equipment, materials or services not otherwise provided for in this proposal, and the obtaining of all permits, licenses or certificates required by any regulatory body for the installation or use of the equipment.

The District Court recognized the inconsistency between the breach theory and the terms of the contract. It attempted to reconcile and explain the inconsistency in its post-trial order as follows:

9. *Warranty.* RCA warrants the equipment of its manufacture (except used equipment, electron tubes, transistors and television tape recorder handwheel panel assemblies) purchased by you hereunder to be free from defects in workmanship and material for a period of one (1) year after delivery and RCA agrees to make good f. o. b. its factory, all defective parts which are returned to RCA's factory, transportation prepaid, provided that our examination discloses that the defects are due to defective workmanship or material and that the equipment has not been misused, altered, repaired, or improperly installed. Correction of such defects by repair or replacement at RCA's factory and the shipment of the repaired or replaced parts to you f. o. b. RCA's factory, shall constitute the fulfillment of all of RCA's obligations in respect of the equipment furnished hereunder. You agree that except for such repair and replacement, RCA shall in no event be liable for damages of any kind connected with the use of the equipment or its failure to function properly. Used equipment shall bear no warranty unless otherwise specified. Electron tubes, transistors and television tape recorder headwheel panel assemblies shall bear the warranty accompanying them at the time of delivery. Equipment furnished by RCA but manufactured by another shall bear the warranty given by such other manufacturer. No warranties other than those set forth in this paragraph are given or are to be implied with respect to the equipment furnished hereunder.

11. *Other Conditions.* (a) Neither RCA nor you shall be liable for general, special, indirect, or consequential damages in connection with any obligations created by this agreement or arising out of any acts performed in relation to such obligations. Both RCA and you acknowledge that such lack of liability, without limiting the generality of the foregoing, extends to loss of actual or anticipated revenue, loss of air time, and damage to the business reputations of either party to this agreement.

In affirming the contract, Fredonia was bound by all its provisions. Included in the provisions was the agreement to be bound by RCA's deferred payment scheme. This deferred payment scheme, as discussed *infra*, was set out in a conditional sales agreement. This conditional sales agreement became part of the contract that Fredonia affirmed.

[U]nless there is some theory under which Fredonia can void the entire February 6 transaction, or at least certain of its terms, it seems clear to the court that Fredonia would be precluded from recovery by the "terms and conditions" portion, which specifically defines the relationship between the parties as regards delivery dates, warranties, and supervision of installation. The effect of the jury's finding on the fraud theory is obvious. Less apparent is the effect of the jury's determination that RCA is liable also upon the warranty and breach of contract theories. To uphold the jury's verdict on the theories of breach of warranty and breach of contract, the court must assume that the jury tacitly reformed the contract, on the basis that RCA fraudulently represented that the warranty, delivery, and supervision provisions were actually different from those provisions as stated in writing in the formal "terms and conditions" attached to the McClanathan proposal. Otherwise, Fredonia is left with the express written provisions of the February 6 proposal which preclude RCA's liability.

[7] We cannot agree that the jury could "reform" the contract. The judgment of the District Court as to breach of contract must be reversed and remanded for a new trial since the jury's answers do not "represent a logical and probable decision on the relevant issues as submitted". *Colvin, Prigmore v. Dempsey—Tegler & Co., Inc.*, 5 Cir., 1973, 477 F.2d 1283, 1285 (1973). See also *Griffin v. Matherne*, 5 Cir., 1973, 471 F.2d 911, 915 and cases cited therein.

Fredonia's claim for damages for fraud may, however, stand independently of the contract claim.

## II. Repudiation of the Contract

[8] In Question No. 11 the jury found that RCA repudiated the contract by deliberately withholding shipment of the equipment until Fredonia executed the Conditional Sales Agreement [Question 11(a)]; by delivering equipment on a delayed, erratic, and incomplete basis [Question 11(b)]; by delivering equipment not suitable for the use for which it was intended and not suitable as is generally sold on the market [Question No. 11(c)]; by withholding personnel necessary to supervise the installation of the equipment [Question No. 11(d)]; and by failing after notice to repair defective equipment [Question No. 11 (e)].

RCA objected to Question No. 11 at the trial level and renews its objection on appeal. RCA argues that Question No. 11 is improper for two reasons. First, RCA contends that the actions of RCA found by the jury to have been repudiation deal with the quality of RCA's performance and not with actions "which render performance impossible or demonstrate a clear determination not to continue with performance". RCA contends that this is the way repudiation is described in Comment 1 to U.C.C. § 2-610, V.T.C.A. Bus. & C. § 2-610.<sup>7</sup> Second, RCA asserts that the jury was not instructed properly as to U.C.C. § 2-610, V.T.C.A. Bus. & Co. § 2.610, since

7. Comment 1 to U.C.C. § 2-610, V.T.C.A. Bus. & C. § 2.610, states as follows:

With the problem of insecurity taken care of by the preceding section and with provision being made in this Article as to the effect of a defective delivery under an installment contract, anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance.

there was no instruction that repudiation (as it is defined in U.C.C. § 2-610, V.T.C.A. Bus. & C. § 2.610) required a loss that would "substantially impair the value of the contract to the other" party.

As to repudiation, the District Court instructed the jury as follows:

Repudiation . . . is defined as such words or actions by a contracting party as indicate that he is not going to perform his contract in the future. It is conduct which shows a fixed intention to abandon, renounce, and refuse to perform the contract.

No Texas Court has as yet interpreted U.C.C. § 2-610, V.T.C.A. Bus. & C. § 2.610, nor has any Court of any state in this Circuit.

RCA's contention that the jury's findings concerning RCA's actions only goes to the quality of the acts and do not have the characteristics of acts of repudiation is without merit. All the acts the jury found in Questions Nos. 11(a)-(e) could have "demonstrated in the jury's mind a clear determination [by RCA] not to continue with performance" or "actions [which would] render performance impossible". The jury was properly instructed as to this aspect of repudiation when the Court instructed the jury that "repudiation is denied by such words or actions . . . [that] indicate [that the contracting party] is not going to perform his contract in the future".

However, the District Court's instruction did not comply with the plain language of U.C.C. § 2-610, V.T.C.A. Bus. & C. § 2.610, which states:

When either party repudiates the contract with respect to a performance not yet due the loss of

which will substantially impair the value of the contract to the other, the aggrieved party may

- (1) for a commercially reasonable time await performance by the repudiating party; or
- (2) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
- (3) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

[9] Clearly, a repudiation is not actionable unless it "substantially impairs the value of the contract". Comment 3 to U.C.C. § 2-610, V.T.C.A. Bus. & C. § 2.610, describes the test to determine if the substantial value of the contract has been impaired as whether a "material inconvenience or injustice will result".

[10] The District Court's instruction was incorrect since it did not tell the jury that for it to find repudiation there must be a substantial impairment of the contract, and it did not define substantial impairment. Therefore, the jury's determination that RCA repudiated the contract cannot stand.<sup>8</sup>

### III. *Fraud*

#### A. *Delivery and Supervision*

In Questions Nos. 1, 2, and 6 the jury made findings as to whether RCA made certain fraudulent misrepresen-

8. See *infra* our discussion as to the measure of damages for repudiation.

tations to Fredonia. The jury found in Question No. 1 that the defendant warranted and represented that if it got the contract it would deliver the equipment so as to meet the air date of June 1, 1969. The jury found in Question No. 2 that the defendant warranted and represented that if it got the contract it would supervise the installation of the equipment. The jury further found in subparts to Questions Nos. 1 and 2 that (1) the representations as to delivery date and supervision were made for the purpose of inducing the plaintiff into a contract [Questions 1(b) and 2(b)]; (2) the representations as to delivery date and supervision were believed and relied upon by Fredonia [Questions 1(c) and 2(c)]; (3) the representations as to delivery date and supervision were made with the intent, design, and purpose of deceiving the plaintiff [Questions 1(d) and 2(d)]; and (4) the representations as to delivery date and supervision were a proximate cause of Fredonia's damages [Questions 1(e) and 2(e)].

The jury found in Question No. 6(a) that the plaintiff relied on the defendant's agents' statements as to delivery date. The jury further found in Question No. 6(b) that the plaintiff relied on the defendant's agents' statements as to the supervision that the defendant would furnish. However, in Question No. 6(c) the jury was asked whether the plaintiff's reliance on the defendant's agents' statements as to date of delivery and supervision of the installation was justified. *The jury answered that the reliance "was not justified"*.

After the jury returned its answers to the questions on liability, the District Court realized that there was a

possible inconsistency<sup>9</sup> to the jury's answer in No. 6(c) [where the jury found reliance was not justified] with the jury's answers in Nos. 1(c), 2(c), 6(a), and 6(b) [where the jury found Fredonia relied on RCA's statements].

The District Court in its order denying RCA's post-trial motions held it not to be required that the reliance induced by the alleged fraudulent conduct must be reasonable. The District Court, citing no cases, stated the law to be:

[i]f an actor induces another by fraudulent misrepresentations to rely on a false promise, and a detriment thereby is suffered by that other, the actor is guilty of fraud although the other's reliance on the promise was unreasonable.

RCA contends that if the reliance was not justified as to these two misrepresentations, then there can be no recovery in damages stemming from these two misrepresentations. RCA states that Texas cases require that for fraud to attach the reliance must be reasonable.

This Court said in *Edwards v. Allied Chemical*, 5 Cir., 1969, 414 F.2d 60 that:

Texas allows recovery for fraud only where the defrauded party 'had a right to rely' on the misrepre-

9. The District Court contemplated resubmitting these questions to the jury. After a discussion with attorneys for both sides, the District Court decided that the verdict for the plaintiff was supported by the jury's findings in other questions where the jury found that the defendant breached or repudiated the contract. Attorneys for both parties agreed resubmission was not necessary. Under Rule 49(a) resubmission is not allowed. Rule 49(b), however, does provide for resubmission. See *Griffin v. Matherne*, *supra* at 917 n. 6.

sentation. *Bell v. Henson*, Ct. of Civil Appeals, 1934, 74 S.W.2d 455 (err. dism'd).

*Id.* at 64.

[11] We must agree with RCA that the District Court erred and that the reliance must be justified. Any damages stemming from RCA's fraudulent misrepresentations as to date of delivery and installation of the equipment cannot lie. Therefore, we need not consider other reasons RCA alleged for overturning the jury's findings in Questions Nos. 1 and 2.

#### B. Merchantability of the Equipment

[12] In Question No. 3(a) the jury found that the defendant represented that it would deliver in the future goods suitable to be sold in the market and suitable for the use which they are intended. The jury further found in succeeding subparts to Question No. 3 that such representation was untrue and made for the purpose of inducing the plaintiff to enter into the contract [3(b)], such representation was relied upon by the plaintiff [3(c)], and such representation was a proximate cause of plaintiff's damages [3(d)]. Unlike in Questions Nos. 1 and 2 the jury was not asked to find in Question No. 3 whether such representation as to the suitability of the goods was made with the intent, design, and purpose of deceiving the plaintiff.

RCA claims that as a matter of Texas law, the jury cannot find fraud unless it finds the defendant had the intent and design to defraud the plaintiff.

[13] This is correct, *Hazle v. McDonald*, 449 S.W.2d 343, 345 (Tex. Civ. App. 1969) and *Dobbs v. Camco*,

*Inc.*, 445 S.W.2d 565, 570 ref. n.r.e. (Tex. Civ. App. 1969). When the fraud involves future performance as was involved in Question No. 3 regarding the future delivery of suitable equipment, then there must be at the time the misrepresentation is made an intent not to perform the promised act. *Medina v. Sherrod*, 391 S.W.2d 66 (Tex. Civ. App. 1965). Therefore, the District Court erroneously omitted a question as to whether RCA had an intent to deceive at the time it represented it would deliver suitable equipment.

However, Fredonia is correct in asserting that, under Rule 49(a), Fed. R. Civ. P., as to any omitted question, it is deemed that the court made a finding on the issue omitted in accordance with the judgment on the special verdict. *L'Urbaine Et La Seine v. Rodriquez*, 5 Cir., 1959, 268 F.2d 1, 4 and *John R. Lewis, Inc. v. Newman*, 5 Cir., 1971, 446 F.2d 800, 805. Since RCA made no objection at the trial to the omitted question, RCA's objection on appeal comes too late. *Id.* and authorities cited therein.

#### C. Misrepresentation as to What Constituted the Contract

[14] In Question No. 4 the jury found that the defendant represented that the plaintiff's delivery of the February 6, 1969, acceptance letter together with its check for \$25,000 would constitute an acceptance of the plaintiff's proposal of January 15, 1969, so as to constitute a valid binding contract between the parties. RCA raises for the first time on appeal numerous objections to this question. RCA's failure to object at trial is waiver of the right to protest on appeal. *Safeway Stores v. Dial*, 5 Cir., 1963, 311 F.2d 595, 600 reh. den. 314 F.2d 33;

*Simmons v. Union Terminal Company*, 5 Cir., 1961, 290 F.2d 453, 454; and *Clegg v. Hardware Mutual Casualty Co.*, 5 Cir., 1959, 264 F.2d 152, 158.<sup>10</sup>

#### D. Error in the Instructions as to Misrepresentation

[15] RCA also claims, as it did at trial, that the District Court erroneously allowed the jury to assess damages for the misrepresentations as to which the jury found that reliance was not justified. RCA contends that this occurred when the District Court instructed the jury as to damages as follows:

In assessing the actual damages, if any, sustained by Fredonia Broadcasting Corporation, Incorporated, you may consider all such damages as were proximately caused by the conduct you have already found on the part of the Defendant, RCA. . . .

The Court before it made the statement about which RCA complains instructed the jury as follows:

Fredonia Broadcasting Corporation, Incorporated, must show a causal connection between the breach and repudiation of the contract and the breach of the warranty of merchantability and the alleged damages. Thus, you should award to the Plaintiff such damages, if any, as you find from a preponderance of the evidence or the direct, natural and proximate result of the breach and repudiation of the contract and breach of warranty of merchantability and that were within the contemplation of the parties at the time of the making of the contract.

10. This same waiver rule applies under Rule 49(b). See the following cases: *Nimnicht v. Evans*, 5 Cir., 1973, 477 F.2d 133 (1973) and *Wyoming Construction Company v. Western Casualty & Surety Company*, 10 Cir., 1960, 275 F.2d 97, cert. den. 362 U.S. 976, 80 S.Ct. 1061, 4 L.Ed.2d 1011.

By this instruction, the Court limited the findings of damages to three specific types of conduct on the part of RCA. The court's allusion to "all such conduct as you already have found" would refer to these three types of conduct mentioned previously and would not allow the jury to consider other conduct which it had already found.

[16] The Court's instruction did not permit the jury to consider or award damages for any type of fraud committed by RCA.<sup>11</sup> The charge to the jury must be taken as a whole and not considered in fragments, *Garrett v. Campbell*, 5 Cir., 1966, 360 F.2d 382, 386, 387 and cases cited therein, and, therefore, we find no error in the charge.

However, since the jury erroneously awarded damages for breach of contract, as discussed *supra*, the jury's determination of the amount of damages cannot stand. Damages are discussed *infra*.

#### E. Strict Liability

[17] Fredonia claims that the jury's answers to Questions Nos. 3(a), 17(a), and 17(b) made RCA liable under strict liability.

11. It should be noted that the District Court in a colloquy with RCA's counsel about the matter stated that "he didn't submit to the jury anything relating to the alleged fraudulent misrepresentation". It should also be noted that the jury's finding of fraudulent warranty of the equipment in Question No. 3 was not effected by the jury's finding in Question No. 6(c) that the reliance was not justified. Question No. 6(c) covered only RCA's fraudulent representation as to date of delivery and degree of supervision. In addition, the District Court in its instruction on damages quoted previously did not instruct the jury that damages could be awarded for the fraudulent warranty.

Section 402A(1) of the Restatement of Torts 2d titled Special Liability of Seller of Product for Physical Harm to User or Consumer states:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or his property.

No physical harm was done to Fredonia's property as a result of the defective condition of any product RCA sold Fredonia. Fredonia suffered only economic loss, and the doctrine of strict liability is not applicable to such losses. *Thermal Supply of Texas, Inc. v. Asel*, 468 S.W.2d 927, 929 (Tex.Civ.App. 1971) and *Eli Lilly and Company v. Casey*, 472 S.W.2d 598, 599 (Tex.Civ.App. 1971).

#### IV. *Damages*

##### A. *Warranty*

[18] RCA argues that the damages for breach of warranty should be limited by the language of the January 15, 1969, proposal which states that "the fulfillment of RCA's obligation in respect [to] the equipment furnished" shall be correction of "defects by repair or replacement at RCA's factory". RCA contends that U.C.C. § 2-719, V.T.C.A. Bus. & C. § 2.719, expressly sanctions the contractual limitation of a seller's liability to the repair or replacement of nonconforming goods. RCA states further that U.C.C. § 2-719, V.T.C.A. Bus. & C. § 2.719, allows this contractual limitation to be the buyer's sole remedy.

Fredonia argues in response that the contractual limitation cannot apply since (1) fraud "vitiates" the contract and (2) U.C.C. § 2-719, V.T.C.A. Bus. & C. § 2.719, is inapplicable because of RCA's fraud in inducing the contract. Furthermore, Fredonia states that U.C.C. § 2-719, V.T.C.A. Bus. & C. § 2.719, does not allow unconscionable and unreasonable limiting provisions.

The language of the provision in the January 15, 1969, proposal limiting RCA's liability for breach of warranty is as follows:

\* \* \* RCA agrees to make good f.o.b. its factory, all defective parts which are returned to RCA's factory, transportation prepaid, provided that our examination discloses that the defects are due to defective workmanship or material and that the equipment has not been misused, altered, repaired or improperly installed. Correction of such defects by repair or replacement at RCA's factory and the shipment of the repaired or replacement parts to you f.o.b. RCA's factory, shall constitute the fulfillment of all RCA's obligations in respect of the equipment furnished hereunder. You agree that except for such repair and replacement, RCA shall in no event be liable for damages of any kind connected with the use of the equipment or its failure to function properly.

Section 2-719, V.T.C.A. Bus. & C. § 2.719, provides as follows:

(a) Subject to the provisions of Subsections (b) and (c) of this section and of the preceding section on liquidation and limitation of damages,

(1) the agreement may provide for remedies in addition to or in substitution for those provided

in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(b) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.

(c) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Section 2-719(a)(1), V.T.C.A. Bus. & C. § 2-719(a)(1), clearly provides that the seller may limit the buyer's remedy to "repair and replacement of non-conforming goods or parts". This same section also states that this remedy may be in "*substitution* for those [remedies] provided in this chapter". (emphasis added.)

Section 2-719(a)(2), V.T.C.A. Bus. & C. § 2-719(a)(2), provides that a remedy provided is optional unless it is "expressly agreed to be exclusive". The language of limitation in RCA's January 15, 1969 proposal does not state explicitly that the remedy provided for is to be the exclusive remedy. However, it is clear that the contractual limitation is intended to be exclusive because the language of the contractual limitation states that repair and replacement "shall constitute the fulfillment of *all*

RCA's obligations in respect of the equipment furnished". [Emphasis added.] Cf. *Dow Corning Corporation v. Capital Aviation, Inc.*, 7 Cir., 1969, 411 F.2d 622, 626.

Section 2-719(a)(1), V.T.C.A. Bus. & C. § 2-719(a)(1), allows a seller to limit the buyer's warranty to repair and replacement and thus limit liability. *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 9 Cir., 1970, 422 F.2d 1013, 1020 and *Lankford v. Rogers Ford Sales*, 478 S.W.2d 248, 251 (Tex.Civ.App. 1972). See also Annot. 17 A.L.R.3d 1010, 1122 and cases cited therein.

[19] Fredonia also claims that the contractual limitation cannot apply because as stated in U.C.C. § 2-719(a)(2), V.T.C.A. Bus. & C. § 2-719(a)(2), the limited remedy fails of its essential purpose. We do not agree, for the facts clearly show that RCA obeyed the limitation by repairing and replacing items which Fredonia claims were defective. See *Lankford v. Rogers Ford Sales*, *supra* at 251; *County Asphalt, Inc. v. Lewis Welding & Engineering Corp.*, 323 F.Supp. 1300, 1309 (S.D.N.Y. 1970), affirmed 2 Cir., 1971, 444 F.2d 372; *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F.Supp. 39, 42 (N.D. Ill., E.D. 1970), and Comment 1 to U.C.C. § 2-719, V.T.C.A. Bus. & C. § 2-719.

Fredonia's contention that the contract limitation cannot apply because the contract was induced by fraud has no merit sense, as we have already discussed, when Fredonia decided to affirm the contract and sue for its breach, it must be bound by the contract terms.

Fredonia's claim that the contract limitation is unconscionable raises a question that the court below did not decide.

The jury's determination in (1) Question 4 as to what the defendant represented the contract to be or (2) in Question 3 as to what the defendant represented the quality of the goods to be has no bearing on whether the contract limitation was unconscionable.

U.C.C. § 2-302, V.T.C.A. Bus. & C. § 2.302, covers unconscionability and provides as follows:

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Comment 1 to Section 2-302, V.T.C.A. Bus. & C. § 2.302 states:

This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background, and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.

[20] U.C.C. § 2-302, V.T.C.A. Bus. & C. § 2.302, requires that the District Court make a determination whether the limitation was unconscionable. On remand<sup>12</sup> the District Court should consider the commercial setting in which the contract was formed. See *County Asphalt, Inc. v. Lewis Welding & Engineering Corp.*, *supra* 323 F.Supp. at 1308, and Comment 1 to U.C.C. § 2-302, V.T.C.A. Bus. & C. § 2.302.

#### B. Consequential Damages

[21] Section 2-719(c), V.T.C.A. Bus. & C. § 2.719 (c), provides as follows:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The language of the January 15, 1969 proposal limited RCA's liability for consequential damages by the following language:

Neither RCA, nor you [Fredonia] shall be liable for general, special, indirect, or consequential damages in connection with any obligations created by the agreement or arising out of any acts performed in relation to such obligations. Both RCA and you acknowledge that such lack of liability, without limiting the generality of the foregoing, extends to loss of actual or anticipated revenue, loss

12. The provision in RCA's contract which limits its damages for breach of warranty makes it unnecessary for us to decide what would be the correct measure of damages for breach of warranty if the contract limitation did not apply.

of air time, and damages to the business reputations of either party to this agreement.

Such limitations are valid and enforceable. *County Asphalt, Inc. v. Lewis Welding & Engineering Corp.*, 323 F. Supp. 1300, 1308 (S.D.N.Y. 1970) affirmed 2 Cir., 1971, 444 F.2d 372. Fredonia again contends that such limitation was unconscionable.

The District Court below did not make such a finding as required by U.C.C. § 2-302, V.T.C.A. Bus. & C. § 2.302, and therefore, we cannot decide the issue.

### C. Repudiation

[22] RCA objected to the District Court's instruction on the measure of damages for repudiation. The District Court's instruction was as follows:

You are instructed that in assessing the actual damages, if any, sustained by Fredonia Broadcasting Corporation, Incorporated, you may consider . . . [the] damages . . . [for repudiation to be] the loss of value of Fredonia's television station business, taking into account the loss of value between the value of the business and its future potential before the station ceased operation and the value of the business after it ceased operation, lost its CBS affiliation and became insolvent.

You may also consider the replacement cost of items of defective equipment furnished by RCA to Fredonia.

RCA contends that the proper measure of damages for repudiation is codified in U.C.C. § 2-713, V.T.C.A. Bus. & C. § 2.713, which provides as follows:

(a) Subject to the provisions of this chapter with respect to proof of market price (Section 2.723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter (Section 2.715), but less expenses saved in consequence of the seller's breach.

(b) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

[23] Clearly, the District Court's instruction on measure of damages for repudiation in light of U.C.C. § 2-713 (a), V.T.C.A. Bus. & C. § 2.713(a), was not correct. No Texas Court has yet interpreted U.C.C. § 2-713, V.T.C.A. Bus. & C. § 2.713, but that section is similar to pre-Code Texas law which states that "the measure of damages for undelivered goods . . . is the difference in the contract price and the market price at the time and place of the breach". *Henderson v. Otto Goedecke, Inc.*, 430 S.W.2d 120, 123 (Tex. Civ. App. 1968); *Otto Goedecke, Inc. v. Henderson*, 388 S.W.2d 728, 730 (Tex. Civ. App. 1965); *Idalou Cooperative Cotton Gin v. Gue*, 317 S.W.2d 240, 247 (Tex. Civ. App. 1958); *Pace Corporation v. Jackson*, 155 Tex. 179, 284 S.W.2d 340, 347 (1955); and *Vise v. Foster*, 247 S.W.2d 274, 281 (Tex. Civ. App. 1952). The only difference between U.C.C. § 2-713(a), V.T.C.A. Bus. & C. § 2.713(a), and pre-Code Texas law is that U.C.C. § 2-713(a), V.T.C.A. Bus. & C. § 2.713(a), specifies that the market price is the price at the time when the buyer learned of the breach.<sup>13</sup>

13. U.C.C. § 2-713(b), V.T.C.A. Bus. & C. § 2.713(b), specifies that market price is to be determined as of the place for tender.

RCA also contends that it was error for the trial judge to permit damages for both repudiation of the contract and breach of warranty of merchantability of the contract since such theories of liability are mutually exclusive. RCA states that these two theories of relief are inconsistent because "repudiation is a failure to make performance not yet due under a contract" which "breach of warranty of merchantability is necessarily a claim of inadequate performance under a contract".

[24] Fredonia argues in opposition that it can try its case on several distinct theories and is not required to elect one remedy to the exclusion of others. Fredonia further states that the measure of actual damages does not differ under the different liability theories it urges.<sup>14</sup>

[25] Fredonia is correct in stating that it can plead under the Federal Rules of Civil Procedure as many theories of relief it has regardless of their consistency. *Pulliam v. Gulf Lumber Co.*, 5 Cir., 1963, 312 F.2d 505, 507 and *Breeding v. Massey*, 8 Cir., 1967, 378 F.2d 171, 178. However, a judgment can not be supported by inconsistent theories if one theory precludes the other or is mutually exclusive of the other. Cf. *Telex Corporation v. Balch*, 8 Cir., 1967, 382 F.2d 211, 213.

14. Fredonia is also incorrect that the measure of damages for breach of warranty and repudiation is the same. U.C.C. § 2-714(b), V.T.C.A. Bus. & C. § 2.714(b), states that the measure of damages for breach of warranty is as follows:

(b) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

This measure of damages is obviously not the same as the measure of damages for repudiation provided for in U.C.C. § 2-713(a), V.T.C.A. Bus. & C. § 2.713(a), laid out in the text *supra*.

[26] Under Texas law prior to the advent of the Uniform Commercial Code, a party faced with anticipatory repudiation could not claim damages for the anticipatory breach and at the same time treat the contract as in force. *Lumbermens Mutual Casualty Company v. Klotz*, 5 Cir., 1958, 251 F.2d 499, 506 (citing Texas cases). See also *Reliance Cooperage Corp. v. Treat*, 8 Cir., 1952, 195 F.2d 977, 981-982.

The Uniform Commercial Code Sections 2-610, V.T.C.A. Bus. & C. § 2.610; 2-711, V.T.C.A. Bus. & C. § 2.711; and 2-106(d), V.T.C.A. Bus. & C. § 2.106(d) require that prior Texas case law give way. No Texas case nor any other state court in this Circuit has faced this exact problem. Therefore, we look to the provisions of the Uniform Commercial Code for an interpretation, as would a Texas state court.

[27, 28] U.C.C. § 2-610, V.T.C.A. Bus. & C. § 2.610, allows the aggrieved party to sue for breach and retain any remedy for breach of the whole contract. U.C.C. § 2-510, V.T.C.A. Bus. & C. § 2.610, provides as follows:

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

- (1) for a commercially reasonable time await performance by the repudiating party; or
- (2) resort to any remedy for breach (Section 2.703 or Section 2.711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

- (3) in either case suspend his own performance or proceed in accordance with the provisions of this chapter on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2.704).

The alternative remedies of U.C.C. § 2-610, V.T.C.A. Bus. & C. § 2.610, are stated in the disjunctive. Under U.C.C. § 2-610(1), V.T.C.A. Bus. & C. § 2.610(1) the aggrieved party can refuse to accede to an anticipatory repudiation and can choose not to sue for the anticipatory repudiation. When the aggrieved party follows this course, the contract remains in existence. Under U.C.C. § 2-610(2), V.T.C.A. Bus. & C. § 2.610(2), the aggrieved party can also treat the anticipatory repudiation as a breach and resort to his remedies under U.C.C. § 2-711, V.T.C.A. Bus. & C. § 2.711, U.C.C. § 2-711(a), V.T.C.A. Bus. & C. § 2.711(a), provides as follows:

(a) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2.612), the buyer *may cancel* and whether or not he has done so may in addition to recovering so much of the price as has been paid

- (1) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
- (2) recover damages for non-delivery as provided in this chapter (Section 2.713).

[Emphasis added]

The key word in U.C.C. § 2-711(a), V.T.C.A. Bus. & C. § 2.711(a), is "cancel"<sup>15</sup> which is defined in U.C.C. § 2-106(d), V.T.C.A. Bus. & C. § 2.106(d), as follows:

(d) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

Thus, the aggrieved party when faced with an anticipatory repudiation can seek his remedies for breach as provided in U.C.C. § 2-711(a) and (b), V.T.C.A. Bus. & C. § 2.711(a) and (b), and can also maintain an action for breach of the contract such as a suit for a breach of warranty. See 67 Am. Jur. 2d, Sales § 516.

Therefore, Fredonia can seek under the Uniform Commercial Code damages for the anticipatory repudiation and for breach of warranty. However, as we have discussed previously, Fredonia's claim for damages for breach of warranty is negated by the terms of the contract that it elected to affirm.

#### D. Fraudulent Representation

RCA contends that the District Court erroneously instructed the jury as to the measure of damages for fraud.

15. The definition of "cancellation" should be contrasted with the definition of "termination" in 2-106(c), V.T.C.A. Bus. & C. § 2.106(c) which provides as follows:

"Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

Specifically, RCA claims that the District Court's instruction on damages [which is set out *in toto* in Part III D of this opinion *supra*] was an instruction as to the measure of damages for fraud.

The District Court's instruction on damages as we have previously said in Part III D does not instruct the jury to consider damages for fraud. The instruction only pertains to the three types of conduct that are specifically enumerated. See our discussion in Part III D. Therefore, there cannot be an erroneous instruction as to damages on fraud.<sup>16</sup>

#### E. Lost Profits

The District Court initially instructed the jury as to future or lost profits as follows:

[Y]ou may consider all such damages as were proximately caused by the conduct you have already found on the part of the Defendant, RCA, including the loss of value of Fredonia's television station business, taking into account the loss of value between the value of the business and its *future potential* before the station ceased operation and the value of the business after it ceased operation, lost its CBS affiliation and became insolvent.

You may also consider the replacement costs of items of defective equipment furnished by RCA to Fredonia. [Emphasis added]

RCA objected to the charge of the District Court. RCA stated that under Texas law the jury under the facts of

16. If fraud is alleged at the new trial when the case is remanded, the District Court must consider, as establishing the measure of damages for fraud, the effect of U.C.C. § 2-721, V.T.C.A. Bus. & C. § 2.721, and the other sections of the code to which it refers.

this case could not award future profits to a new and unestablished business. The District Court agreed to correct its charge and or give an instruction on future profits. The District Court's corrected instruction was as follows:

You are instructed that one of the elements of damage as it relates to alleged future potential loss—as it relates to the alleged future potential of Plaintiff's television station, is a loss of profits that the Plaintiff allegedly anticipated from the contract in question.

In this connection are you instructed as to this element the Plaintiff is entitled to recover only net profits. The Plaintiff is not entitled to his expected gross profits.

In determining the net profits which Plaintiff reasonably anticipated from the performance of the contract in question, you will determine that amount of money that the Plaintiff reasonably would have made over and above the expense that would have been incurred in the production of that income. As to such anticipated future profits, which Plaintiff contends that it could reasonably have been expected to make in the ordinary course of business, but for the breach and repudiation of the contract and the breach of warranty, the Plaintiff has the burden of proving that he actually lost business as a result of the breach and repudiation of the contract and breach of warranty, and that this loss of business resulted in a loss of net profits.

RCA objected again to the new charge on the basis that there was no evidence in the record to support a finding of lost profits.

[29] Under Texas law future profits are allowed in a contract action as part of the damages to *an established business*. *Atomic Fuel Extraction Corporation v. Slick's Estate*, 386 S.W.2d 180, 188 (Tex. Civ. App. 1964), writ ref'd n.r.e. 403 S.W.2d 784 (Tex. 1966). When the business is new and unestablished, future profits have been consistently denied under Texas law. *Id.* at 189. It was made very clear in *Atomic Fuel Extraction Corporation v. Slick's Estate*, *supra*, that in those cases where future profits were allowed to be recovered, "there was some data and history of profits from an established business". *Id.* at 188 (citing Texas cases). In the more recent Texas case of *Southwest Bank & T. Co. v. Executive Sportsman Ass'n*, 477 S.W.2d 920 (Tex. Civ. App. 1972), the Court reaffirmed this rule and said:

[T]he case . . . is governed by the well-established rule that prospective profits from a new enterprise which has no history of profits are too remote and speculative to be included in compensatory damages (citing Texas cases).

*Id.* at 929.

[30] Fredonia contends that future profits are permitted to be awarded to new enterprises under our decision in *Mechanical Wholesale, Inc. v. Universal-Rundle Corp.*, 5 Cir., 1970, 432 F.2d 228. In that decision we made it very clear that the factor that the enterprise was new was not controlling, but rather what was conclusive was the record of profits of the enterprise. We said in *Mechanical Wholesale, Inc. v. Universal-Rundle Corp.*, *supra*, as follows:

[T]he mere fact that Mechanical was a new business does not automatically exclude its claim for future lost profits. *Pace Corp. v. Jackson*, *supra* [155 Tex. 179, 284 S.W.2d 340]. Though new, Mechanical had a rapidly growing business. There was evidence from which the jury could have concluded that but for the breach Mechanical's commercial business would have grown at the same rate its other sales grew. Mechanical was entitled to recover profits which would have accrued from any normal increase in business if that increase failed to occur as a result of Rundle's breach.

Fredonia's financial records show clearly that in no month during the time that the station was on the air did it make a profit. Fredonia was also operating in an unfavorable business climate. Its station, which was a UHF station, was in competition in the same town with a VHF station. Fredonia's president, Cudlipp, admitted that a UHF station was not as favorable as a VHF station since not all television sets are equipped to receive UHF channels. Therefore, the District Court erred in submitting lost prospective profits as an element of Fredonia's damages.

#### F. Exemplary Damages

[31] RCA is correct in stating that the District Court erred in awarding Fredonia exemplary damages. We stated previously in Part III D that the District Court's instruction did not permit the jury to consider or award damages for fraud. Therefore, the District Court was permitting the jury to award exemplary damages for Fredonia's claims based on breach of contract, breach of warranty, or repudiation. Texas law is clear that exemplary damages cannot be awarded for a contract action.

Success Motivation Institute, Inc. v. Jamieson Film Co., 473 S.W.2d 275, 282 (Tex. Civ. App. 1971); Graham v. Turner, 472 S.W.2d 831, 839 (Tex. Civ. App. 1971); Export Ins. Co. v. Herrera, 426 S.W.2d 895, 900, ref. n.r.e. (Tex. Civ. App. 1966); and McDonough v. Zamora, 338 S.W.2d 507, 513 (Tex. Civ. App. 1960).

#### G. Absence of Evidence of Damages<sup>17</sup>

RCA contends that the damages found by the jury to have proximately resulted from RCA's breach of contract, breach of warranty, and repudiation were not supported by evidence of monetary loss.

We agree that Fredonia did not prove its damages to the required reasonable certainty.

[32, 33] Of course, Fredonia's recovery of damages may not be defeated because it failed to prove its damages with exactness. Southwest Battery Corp. v. Owen, 131 Tex. 423, 115 S.W.2d 1097, 1099 (Tex. S. Ct. 1938). Damages in a contract action must be based on evidence that affords a sufficient basis for estimating their amount in money with *reasonable* certainty. Schoenberg v. Forrest, 253 S.W.2d 331, 334 (Tex. Civ. App. 1952) and authorities cited therein. While it is true that a party who breaches a contract cannot escape liability because it is impossible to state or prove a perfect measure of damages, Southwest Battery Corp. v. Owen, *supra* 115 S.W.2d at 1099, it is also true that a defendant in a contract action cannot be assessed with damages that are based on mere

17. We are not discussing in this section of the opinion the proper *measure* of damages to be used, but are discussing only the sufficiency of the evidence. In other parts of this opinion we have discussed where appropriate the measure of damages for a particular cause of action that was alleged.

opinion and do not rise to the level of a reasonable certainty. Schoenberg v. Forrest, *supra* 253 S.W.2d at 336.

[34] Clearly, Fredonia should have presented evidence of its damages that would have been more convincing. This is not a case of proven damages uncertain in amount, but rather damages that were not proved at all to a reasonable certainty. Jordan v. Cartwright, 347 S.W.2d 799, 801 (Tex. Civ. App. 1961). Cf. Household Goods Carriers' Bureau v. Terrell, 5 Cir., 1969, 417 F.2d 47, 53.

RCA claims further that it was improper for the jury to base its award of damages on the opinion of Fredonia's expert witness, Norman Fischer, as to the value of the enterprise at various points in time.

[35] In Texas, as contrasted to other jurisdictions, witnesses are allowed to give their opinion as to the value of property before and after it is injured. Southwestern Bell Telephone Company v. Willie, 329 S.W.2d 466, 467 (Tex. Civ. App. 1959) and Houston & T.C.R. Co. v. Ellis, 111 Tex. 15, 224 S.W. 471 (1920). The distinction is not with the method Fredonia used in proving damages but rather with the method's inexactness in the present case.

#### V. The Counterclaim

RCA counterclaimed for the amount due on the broadcast equipment it delivered. The counterclaim was based on the conditional sales agreement that Fredonia signed. The counterclaim was denied on the basis of the jury's answer to Question No. 18 where the jury found that Fredonia signed involuntarily because of coercion by RCA the conditional sales agreement and the accompanying promissory notes.

On appeal RCA contends that the District Court erred in not granting RCA's motion for a directed verdict on this issue because "there was no conflict in substantial evidence which would create a jury question on the issue of coercion".

Fredonia claims that this court cannot consider on appeal the sufficiency of the evidence because RCA did not object to the instruction or Question No. 18 concerning coercion. Fredonia further argues that the evidence was sufficient to support the jury's finding of coercion.

[36] Fredonia's argument misses the point. RCA's objection to Question No. 18 does not go to the *form* of Question No. 18 or the *submission* of Question No. 18 to the jury, but rather RCA's objection is to the sufficiency of the evidence supporting the jury's finding in Question No. 18. Cf. *Clegg v. Hardware Mutual Casualty Co.*, 5 Cir., 1959, 264 F.2d 152, 158 and *Merrill v. Beaute Vues Corporation*, 10 Cir., 1956, 235 F.2d 893, 897. RCA preserved its objection to the sufficiency of the evidence as to coercion by renewing its motion for a directed verdict at the close of all the evidence and by asking for a judgment notwithstanding the verdict after entry of the judgment. Rule 50(b), Fed. R. Civ. P. See *Hernandez v. Employers Mut. Liab. Ins. Co.*, 5 Cir., 1965, 346 F.2d 154, 155, *Travelers Ins. Co. v. Stanley*, 5 Cir., 1958, 252 F.2d 115, and 5A Moore's Federal Practice § 50.05[1].

[37] The evidence did not support a finding of coercion. It clearly shows the following: (1) McFarland admitted that he knew at the time he prepared the acceptance letter of February 6, 1969, that RCA would require the signing of a conditional sales agreement, (2)

McFarland further testified that the February 6, 1969, acceptance letter contemplated the signing of a conditional sales agreement, (3) the January 15, 1969, proposal states that if the buyer agrees to deferred payment terms then the buyer agrees to execute RCA's standard form of deferred payment contract, and (4) there was no evidence that RCA made any demands that it did not have a legal right to make. Therefore, on this evidence there can be no doubt that reasonable men could not have arrived at a contrary verdict. *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365, 374.

We conclude that the District Court erred in denying RCA's motion for a directed verdict on the coercion issue.

## VI. Summary

By reason of the complexity of this litigation, we deem it appropriate to summarize our holdings:

- (1) The jury found that Fredonia affirmed the contract. Fredonia's breach claims are precluded by the terms of the contract it affirmed. Damages awarded for breach of contract may not be allowed.
- (2) The jury's determination that RCA repudiated the contract cannot stand because the District Court's instruction on repudiation was erroneous. The District Court also erroneously instructed the jury as to the measure of damages for repudiation. Fredonia can seek damages for both repudiation and breach of warranty. If on remand, the District Court finds that the terms are not unconscionable, then Fredonia's claim for breach of warranty will be foreclosed.

- (3) The jury's findings that RCA made misrepresentations as to date of delivery and degree of supervision are negated by the jury's finding that such reliance was not justified. The jury's finding as to RCA's misrepresentation stands. However, we find that the jury was never instructed as to damages for fraud. Therefore, any damages that the jury awarded do not include damages for misrepresentations. On remand, if Fredonia seeks relief under a claim for fraud, it need only seek to prove damages as to the misrepresentation as to merchantability. Fredonia's fraud claims stand independent of its contract actions. Fredonia cannot seek damages under the theory of strict liability.
- (4) RCA's contract language prevents Fredonia from seeking damages for breach of warranty. On remand the District Court is directed to determine whether this contract language was unconscionable. The same applies to the contract's terms as to consequential damages. Fredonia cannot under Texas law seek damages for lost profits. Fredonia, on remand, can seek exemplary damages if fraud is proven. Fredonia must prove its damages to a reasonable certainty.

Reversed and remanded with instructions.

## APPENDIX A

### INTERROGATORY NO. ONE

(a) Do you find from a preponderance of the evidence that prior to or on February 6, 1969, the defendant represented, warranted, or agreed that if it got the contract with plaintiff, it would ship and deliver the equipment contracted for so as to meet the target on-the-air date of June 1, 1969?

Answer "Yes" or "No".

ANSWER: Yes

If you have answered the foregoing Interrogatory No. 1(a) "yes", and only in such event, you will complete your answer to the following parts of Interrogatory No. One.

(b) Do you find from a preponderance of the evidence that such representation, if any, by the defendant was untrue, and made for the purpose of inducing plaintiff to enter into the contract in question?

Answer "Yes" or "No".

ANSWER: Yes

(c) Do you find from a preponderance of the evidence that the plaintiff believed and relied on such representation, if any, by the defendant prior to February 6, 1969?

Answer "Yes" or "No".

ANSWER: Yes

(d) Do you find from a preponderance of the evidence that such representation, if any, was made with the intention, design, and purpose of deceiving the plaintiff and with no intention of performing that which was promised?

Answer "Yes" or "No".

ANSWER: Yes

(e) Do you find from a preponderance of the evidence that such representation, if any, was a proximate cause

of plaintiff's damages, if any, as a result of the loss of its broadcasting business?

Answer "Yes" or "No".

ANSWER: Yes

### INTERROGATORY NO. TWO

(a) Do you find from a preponderance of the evidence that the defendant represented, warranted, or agreed prior to or on February 6, 1969, that if it should get the contract it would furnish its representatives to supervise the installation of the equipment supplied and furnished by it and instruct plaintiff's personnel in the operation and adjustment thereof?

Answer "Yes" or "No".

ANSWER: Yes

If you have answered the foregoing Interrogatory No. Two (a) "Yes", and only in such event, you will complete your answer to the following parts of Interrogatory No. Two.

(b) Do you find from the preponderance of the evidence that such representation by the defendant was untrue, and made for the purpose of inducing plaintiff to enter into the contract in question?

Answer "Yes" or "No".

ANSWER: Yes

(c) Do you find from a preponderance of the evidence that the plaintiff believed and relied upon such representation by the defendant prior to February 6, 1969?

Answer "Yes" or "No".

ANSWER: Yes

(d) Do you find from a preponderance of the evidence that such representation was made with the intention, design, and purpose of deceiving the plaintiff and with no intention of performing that which was promised?

Answer "Yes" or "No".

ANSWER: Yes

(e) Do you find from a preponderance of the evidence that such representation was a proximate cause of plaintiff's damages, if any, as a result of the loss of its broadcasting business?

Answer "Yes" or "No".

ANSWER: Yes

### INTERROGATORY NO. THREE

(a) Do you find from a preponderance of the evidence that the defendant warranted, represented, or agreed, prior to or on February 6, 1969, that if it should get the contract it would furnish goods of a quality such as are generally sold in the market and suitable for that which they are intended, or for the particular uses to which the goods are to be put?

Answer "Yes" or "No".

ANSWER: Yes

If you have answered the foregoing Interrogatory No. Three (a) "Yes", and only in such event, you will com-

plete your answer to the following parts of Interrogatory No. Three.

(b) Do you find from a preponderance of the evidence that such representation by the defendant was untrue, and made for the purpose of inducing plaintiff to enter into the contract in question?

Answer "Yes" or "No".

ANSWER: Yes

(c) Do you find from a preponderance of the evidence that the plaintiff believed and relied upon such representation by the defendant prior to February 6, 1969?

Answer "Yes" or "No".

ANSWER: Yes

(d) Do you find from a preponderance of the evidence that such representation was a proximate cause of plaintiff's damages, if any, as a result of the loss of its broadcasting business?

Answer "Yes" or "No".

ANSWER: Yes

#### INTERROGATORY NO. FOUR

(a) Do you find from a preponderance of the evidence that at the February 6, 1969, meeting between officials of the plaintiff and the defendant that the defendant represented that the delivery of the plaintiff's letter of acceptance together with its check for \$25,000 would constitute an acceptance of the plaintiff's proposal of

January 15, 1969, so as to constitute a valid, binding contract between the parties?

Answer "Yes" or "No".

ANSWER: Yes

If you have answered the foregoing Interrogatory No. Four (a) "Yes", and only in such event, you will complete your answer to the following parts of Interrogatory No. Four:

(b) Do you find from a preponderance of the evidence that such representation by the defendant was untrue, and made for the purpose of inducing plaintiff to enter into the contract in question?

Answer "Yes" or "No".

ANSWER: Yes

(c) Do you find from the preponderance of the evidence that such representation by the defendant was believed and relied upon by the plaintiff?

Answer "Yes" or "No".

ANSWER: Yes.

(d) Do you find from a preponderance of the evidence that such representation was a proximate cause of plaintiff's damages, if any, as a result of the loss of its broadcasting business?

Answer "Yes" or "No".

ANSWER: Yes

## INTERROGATORY NO. FIVE

Do you find from a preponderance of the evidence that plaintiff at all times after January 1, 1969, and prior to June 1, 1969, knew, or should have reasonably known, that it was not able to begin UHF Television broadcasting on June 1, 1969?

Answer "Yes" or "No".

ANSWER: No.

## INTERROGATORY NO. SIX

(a) Do you find from a preponderance of the evidence that plaintiff did not rely on any statements of defendant's agents, George McClanathan or Dana Pratt, as to the delivery and installation of RCA equipment by June 1, 1969?

Answer "It did rely" or "It did not rely".

ANSWER: It did rely.

(b) Do you find from a preponderance of the evidence that plaintiff did not rely on any statements of defendant's agents, George McClanathan or Dana Pratt, as to the obligation of the defendant to furnish representatives to supervise the installation of the equipment and instruct plaintiff's personnel in its operation and adjustment?

Answer "It did rely" or "It did not rely".

ANSWER: It did rely.

If you have answered "It did rely" to either or both of the preceding Interrogatories Nos. 6(a) and (b), and only in such event, you will answer the following:

(c) Do you find from a preponderance of the evidence that such reliance was not justified?

Answer "It was justified" or "It was not justified".

ANSWER: It was not justified.

## INTERROGATORY NO. SEVEN

Do you find from a preponderance of the evidence that the parties intended that the defendant's proposal of January 15, 1969, coupled with the plaintiff's letter of acceptance of this proposal, dated February 6, 1969, and oral representations, if any, made to the plaintiff by the defendant, constituted the contract between the parties?

Answer "It did" or "It did not".

ANSWER: It did.

## INTERROGATORY NO. EIGHT

Do you find from a preponderance of the evidence that the Conditional Sales Agreement signed by the plaintiff on April 20, 1969, constituted the contract between the parties?

Answer "It did" or "It did not".

ANSWER: It did not.

If you have answered Interrogatory No. Seven "It did", and Interrogatory No. Eight, "It did not", you will proceed to answer the following Interrogatories. Otherwise, it will not be necessary that they be answered by you.

## INTERROGATORY NO. NINE

Do you find from a preponderance of the evidence that the defendant breached the contract in any one or all of the following particulars:

(a) By deliberately withholding shipment to the plaintiff of the items of equipment contracted for more than 75 days after February 6, 1969, and thereafter until plaintiff completed documents submitted to it by the defendant?

Answer "Yes" or "No".

ANSWER: Yes

(b) By delivering such equipment contracted for on a delayed, erratic, and incomplete basis?

ANSWER: Yes

(c) By delivering equipment that was not of a quality such as is generally sold in the market and suitable for that which it is intended or for the particular uses to which the goods were to be put?

Answer "Yes" or "No".

ANSWER: Yes

(d) By withholding personnel necessary to supervise the installation of equipment until after June 1, 1969, and in failing to maintain such supervisory personnel on the site, except on an intermittent and irregular basis?

Answer "Yes" or "No".

ANSWER: Yes

(e) By failing, after notice, if any, to correct or remedy any such condition, or repair or replace any such equipment?

Answer "Yes" or "No".

ANSWER: Yes

If you have answered "Yes" to any one or all of the foregoing allegations of breach of contract, stated in Interrogatory No. Nine (a) through (e), and only in such event, you will then answer the following interrogatory.

## INTERROGATORY NO. TEN

Do you find from a preponderance of the evidence that any conduct of the defendant stated in Interrogatory No. Nine (a) through (e) was a proximate cause of the damages, if any, sustained by the plaintiff as a result of the loss of its television broadcasting business?

Answer "Yes" or "No".

ANSWER: Yes

## INTERROGATORY NO. ELEVEN

Do you find from a preponderance of the evidence that the defendant repudiated the contract in any one or all of the following particulars:

(a) By deliberately withholding shipment to the plaintiff of the items of equipment contracted for for more than 75 days after February 6, 1969, and thereafter until plaintiff completed documents submitted to it by the defendant?

Answer "Yes" or "No".

ANSWER: Yes

(b) By delivering such equipment contracted for on a delayed, erratic, and incomplete basis?

Answer "Yes" or "No".

ANSWER: Yes

(c) By delivering equipment that was not of a quality such as is generally sold in the market and suitable for that for which it was intended, or for the particular uses to which the goods were to be put?

Answer "Yes" or "No".

ANSWER: Yes

(d) By withholding personnel necessary to supervise the installation of equipment until after June 1, 1969, and in failing to maintain such supervisory personnel on the site, except on an intermittent and irregular basis?

Answer "Yes" or "No".

ANSWER: Yes

(e) By failing, after notice, if any, to correct or remedy any such condition, or repair or replace any such equipment?

Answer "Yes" or "No".

ANSWER: Yes

If you have answered "Yes" to any one or all of the foregoing allegations of repudiation of contract, stated in Interrogatory No. Eleven (a) through (e), and only in such event, you will then answer the following interrogatory.

#### INTERROGATORY NO. TWELVE

Do you find from a preponderance of the evidence that any conduct of the defendant stated in Interrogatory

No. Eleven (a) through (e) was a proximate cause of the damages, if any, sustained by the plaintiff as a result of the loss of its television broadcasting business?

Answer "Yes" or "No".

ANSWER: Yes

If you have answered "Yes" to either or both of Interrogatories Numbered Ten or Twelve, and only in such event, you will answer the following Interrogatory.

#### INTERROGATORY NO. THIRTEEN

Do you find from a preponderance of the evidence that plaintiff waived such breach or repudiation?

Answer "It did" or "It did not".

ANSWER: It did not.

#### INTERROGATORY NO. FOURTEEN

(a) Do you find from a preponderance of the evidence that the management of plaintiff's television broadcasting business was not qualified professionally to operate a successful UHF television broadcasting station?

Answer "It was" or "It was not".

ANSWER: It was.

If you have answered Interrogatory No. Fourteen "It was", and only in such event, then you will answer the following Interrogatory:

(b) Do you find from a preponderance of the evidence that such lack of professional qualifications on the part of the plaintiff's management proximately caused the

damage, if any, resulting from the loss of plaintiff's television broadcasting business?

Answer "Yes" or "No".

ANSWER: No.

#### INTERROGATORY NO. FIFTEEN

(a) Do you find from a preponderance of the evidence that the engineering and technical staff of plaintiff's television broadcasting business was not qualified technically by experience or training to operate successfully a UHF television broadcasting station?

Answer "It was" or "It was not".

ANSWER: It was.

If you have answered the preceding Interrogatory No. Fifteen (a) "It was", and only in such event, then you will answer the following Interrogatory.

(b) Do you find from a preponderance of the evidence that such lack of technical experience and training was a proximate cause of the damages, if any, resulting from the loss of plaintiff's television broadcasting business?

Answer "Yes" or "No".

ANSWER: No

#### INTERROGATORY NO. SIXTEEN

(a) Do you find from a preponderance of the evidence that plaintiff was undercapitalized and lacked the financial capability to conduct a successful UHF television broadcasting station?

Answer "Yes" or "No".

ANSWER: No

If you have answered the preceding Interrogatory No. Sixteen (a) "Yes", and only in such event, then you will answer the following Interrogatory.

(b) Do you find from a preponderance of the evidence that such undercapitalization and lack of financial capability proximately caused the damages, if any, sustained by the plaintiff as a result of the loss of its television broadcasting business?

Answer "Yes" or "No".

ANSWER: No

#### INTERROGATORY NO. SEVENTEEN

(a) Do you find from a preponderance of the evidence that the goods furnished to the plaintiff by the defendant were of a quality such as are generally sold in the market and suitable for that for which they are intended, or for the particular uses to which the goods are to be put?

Answer "Yes" or "No".

ANSWER: No

If you have answered the preceding Interrogatory No. Seventeen (a) "No", and only in such event, then you will answer the following Interrogatory.

(b) Do you find from a preponderance of the evidence that the failure of the defendant to supply goods of a quality such as are generally sold in the market and suitable for that for which they are intended, or for the

particular uses to which the goods are to be put was a proximate cause of the damage, if any, sustained by the plaintiff as a result of the loss of its television broadcasting business?

Answer "Yes" or "No".

ANSWER: Yes

#### INTERROGATORY NO. EIGHTEEN

Do you find from a preponderance of the evidence that the plaintiff, acting through its president, involuntarily signed promissory notes and the Conditional Sales Agreement of April 20, 1969, because of the coercive effect, if any, of the defendant's deliberate withholding, if any, of shipments to the plaintiff of items of equipment necessary for plaintiff to meet its alleged target on-the-air date of June 1, 1969?

Answer "Yes" or "No".

ANSWER: Yes

#### INTERROGATORIES ON DAMAGES

##### INTERROGATORY NO. ONE

From a preponderance of the evidence, what sum of money, if any, do you assess as actual damages sustained by the plaintiff, Fredonia Broadcasting Corporation?

Answer in dollars and cents.

ANSWER: Eight hundred and fifty thousand dollars

#### INTERROGATORY NO. TWO

From a preponderance of the evidence, what sum of money, if any, do you assess as exemplary damages against RCA in favor of the plaintiff, Fredonia Broadcasting Company?

Answer in dollars and cents.

ANSWER: One hundred and fifty thousand dollars.

GEWIN, Circuit Judge (concurring in the result):

I concur in the result reached by my Brother Coleman in this case. In my view the district court committed errors with respect to its rulings and jury instructions as to the issues of liability and damages. Accordingly it is necessary for us to reverse the judgment and to remand the case for a new trial.

## APPENDIX C

## FIFTH AMENDMENT, U.S. CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE  
JEOPARDY; SELF-INCRIMINATION; DUE  
PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property taken for public use, without just compensation.

## APPENDIX D

## FOURTEENTH AMENDMENT, U.S. CONSTITUTION

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES  
AND IMMUNITIES; DUE PROCESS; EQUAL  
PROTECTION; APPORTIONMENT OF REPRESENTATION;  
DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## APPENDIX E

### TEXT OF STATUTE INVOLVED (28 USCA § 144)

#### § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

As amended May 24, 1949, c. 139, §65, 63 Stat. 99.

**APPENDIX F****RULE 7; UNITED STATES SUPREME COURT****Rule 7. Clerks to justices not to practice**

No one serving as a law clerk or secretary to a justice of this court shall practice as an attorney or counsellor in any court or before any agency of government while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court until two years have elapsed after such separation; nor shall he ever participate, by way of any form of professional consultation and assistance, in any case that was pending in this court during the period that he held such position.

**APPENDIX G****RULE 19; UNITED STATES SUPREME COURT****Rule 19. Considerations governing review on certiorari**

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

Supreme Court, U. S.

FILED

JUL 31 1978

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court  
of the United States**

October Term, 1978

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No. 78-11

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FREDONIA BROADCASTING CORP., INC.,  
*Petitioner,*  
v.  
RCA CORPORATION,  
*Respondent.*

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**RESPONDENT RCA CORPORATION'S BRIEF  
IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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FREDONIA BROADCASTING CORP., INC.,  
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RCA CORPORATION,  
*Respondent.*

**RESPONDENT RCA CORPORATION'S BRIEF  
IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

Respondent, RCA Corporation, prays that the petition of Fredonia Broadcasting Corp., Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on March 8, 1978 (the "petition") be denied.

**QUESTIONS PRESENTED**

1. Whether a trial judge errs in failing to recuse himself, when it comes to his attention that a party is being actively represented by the trial judge's former law clerk who actively participated as a law clerk in the first trial of the case, and it is inappropriate to disqualify counsel.

2. The court of appeals, on independent grounds for reversal, among other things (i) held that RCA "correctly claims error" on the applicable state-law measure of damages, (ii) held that the trial judge's charge contravened the court of appeals' decision on the first appeal, (iii) discusses the erroneous evidence admitted and sets forth with specificity the limited evidence that should have been admitted, and (iv) remands for further proceedings consistent with its decision.

Fredonia criticizes the Opinion of the court of appeals because it does not contain language stating that the trial judge's errors on questions of state-law damage issues were "harmful" or that the errors "resulted in an erroneous verdict."

Does this criticism present a question for review by this Court on writ of certiorari?

### STATEMENT OF THE CASE

Fredonia's statement of the case is substantially accurate except for the last paragraph (Pet. 5)\* which inaccurately and incompletely characterizes the holding of the court of appeals in favor of RCA and the reasons therefor. Accordingly, RCA sets forth the significant proceedings below.

#### Disqualification.

Seven months prior to the second trial of this case, RCA moved in open court to declare a disqualification of Fre-

\* References to the Petition and the Opinion are represented by "Pet." and "Opinion" respectively followed by a page reference to the material cited. References to the record on appeal are referenced by an "A" followed by a number, representing the page of the Appendix filed below on which the material cited is found.

donia's counsel because the trial judge's former law clerk who had actively participated with the court throughout the first trial was now actively representing and appearing for Fredonia (A. 286-309). The remedy sought was recusal of the trial judge should removal of Fredonia's counsel seem inappropriate.

The motion was made at a hearing after RCA received unexplained correspondence from the trial judge addressed to his former clerk, as counsel for Fredonia, even though the clerk had never been counsel of record in the matter. This correspondence (copy attached as A-1) had asked the former clerk for the position of Fredonia regarding RCA's motion for judgment on its \$506,333.80 counterclaim which had been tried — and denied — while the law clerk was still with the judge at the first trial. At the hearing on RCA's motion, the former law clerk appeared before the trial court on behalf of Fredonia.

At the beginning of the hearing, counsel for RCA expressed RCA's concern over the "appearance of impropriety" and the substantive "very distinct advantage to Fredonia" created by what had transpired and what might occur. Fredonia's counsel objected to its disqualification and even to the recusal of the judge. The trial judge, by order, refused to declare Fredonia's counsel disqualified or to recuse himself (A. 84-85). In his order, the trial judge set forth the undisputed facts that the former law clerk had "participated in the recent proceedings in the case" and had "worked on the case when it was tried for the first time." Nonetheless, the trial judge ruled that no law or rule required disqualification of the firm, that his recusal "would not serve any purpose" and that he had been advised that the clerk would "participate no further" in the case.

The court of appeals held that having been presented with a situation where the appearance of impropriety was

already established, the trial judge should have purged the disqualifying relationship by recusing himself.\*

#### State-Law Damage Issues.

At the trial, RCA frequently objected to evidence which fell outside the scope of any proper measure of damages according to Texas law or the opinion of the court of appeals on the first appeal of the case. Over RCA's objection, Fredonia was permitted to introduce evidence which contravened the opinion of the appellate court on the first appeal and additional evidence, in contravention of Texas law, which included "fictitious, conjectural, speculative, or contingent values" (Opinion 259). The court of appeals on the present appeal concluded that "RCA correctly claims error in the trial court's instructions, in the second trial, on the measurement of damages" (Opinion 259) and sets forth, with specificity, the damages, if any, to which Fredonia may be entitled according to Texas law.

Fredonia's statement of the case avoids any reference to the court of appeals' Opinion regarding state law damage issues.

#### ARGUMENT

None of the character of reasons contemplated by Supreme Court Rule 19 suggests that this case is appropriate for review by certiorari.

As to the disqualification issue, the court of appeals' decision is in furtherance of established principles reflected in the decisions of this Court and this Court's Rule 7 and similar rules of other courts. The court of appeals in apply-

\* On June 30, 1978, on the basis of the court of appeals' decision, the chief judge of the Eastern District of Texas ordered the transfer of the case to a different judge in the district.

ing these familiar concepts exercised its supervisory powers to protect the integrity of the judicial process by determining the propriety of a judge's decision to sit in judgment. *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109-110 (5th Cir. 1974); see also, *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

On the state law damage issues, Fredonia's petition is aimed at language style in the Opinion of the court of appeals, and in fact presents no substantive issue for review by this Court.

#### Disqualification.

The court of appeals' Opinion itself contains an admirably succinct statement of why the trial judge below should have recused himself (569 F.2d at 255, 256):

No matter how many assurances were given by Fredonia's counsel that the former law clerk would withdraw from the case, we think it clear that the propriety of continuing the proceedings before this district judge had been irrevocably tainted, and the impartiality of the judge had been reasonably questioned.

• • •

When, as here, a judge is confronted with a situation where the appearance of impropriety is already established, a taint on the judicial system remains as long as he presides over the case.

This statement reflects the spirit of Justice Frankfurter's equally succinct and sterling passage on recusal in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 466-467 (1952).

The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which

men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

Fredonia treats these sensitive ethical considerations as if they never existed. Fredonia's argument instead scrambles together two quite different factual circumstances — one that did happen and one that did not — in order to create an issue in this Court which never existed below. Starting with the premise that RCA's motion was to have *Fredonia's counsel*, and not the trial judge, declared *disqualified in that particular court*, Fredonia nimbly jumps to the proposition that because it is now established the judge should have recused himself to cure that uniquely limited disqualification of counsel, RCA should have filed an affidavit pursuant to 28 U.S.C. §144 so as to seek *disqualification of the trial judge for personal bias*.

Fredonia's argument thus proceeds upon the premise that any time a judge recuses himself, such recusal must be because of personal bias and prejudice. Such a premise is, of course, untrue. Judges must and do recuse themselves on many occasions, even without suggestion of counsel, whenever there exists an appearance of impropriety that might jeopardize notions of fairness. Merely because the proper remedy was recusal does not mean that the trial judge could not have proceeded fairly in this case — had not his law clerk been one of counsel representing Fredonia before that judge. The trial court *could* have dis-

qualified counsel from representing Fredonia altogether in the case, thereby curing any defect. Either remedy, removal of the firm or recusal of the court, would have satisfied ethical imperatives.

Fredonia's argument also fails on its own statement of the facts. If, as Fredonia agrees, RCA's motion sought a declaration of disqualification of the law firm, as it did, and not the trial judge, then there was no reason to proceed under 28 U.S.C. §144. Thus, Fredonia's discussion about requirements of affidavits of personal bias or prejudice of the trial judge never was at issue, nor is it today.\* RCA's motion was in fact a motion to declare the disqualification of Fredonia's counsel because of the tainted relationship of the judge's former law clerk having already represented and appeared for Fredonia in the second consideration of this case. RCA based its motion on canons of professional responsibility and on the standards embodied in rules such as Rule 7 of this Court, all of which pointed inexorably to the conclusion that there had been created an appearance of impropriety. RCA did not claim and could not claim that the trial judge had "a personal bias or prejudice" against it, as contemplated by 28 U.S.C. §144. Fredonia's position that RCA failed to show that the trial judge "was actually engaged in actions that compromised his integrity" (Pet. 10) and that the law clerk "engaged in any improper action" (Pet. 11) is addressed to an issue never present in this case, and simply attempts to shunt attention away from the questions centering on

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\*Fredonia raises its statutory claim for the first time in this case in its petition. An examination of the hearing record (A. 286-309) and Fredonia's written opposition at the trial level reveals Fredonia understood then, even if it has forgotten now, that RCA's motion was to have Fredonia's law firm declared disqualified before this particular trial judge alone. (A. 79-83).

ethical disqualification based on the self-evident appearance of impropriety created by the law clerk and his firm.

RCA made perfectly clear to the trial judge that its motion for a declaration of disqualification and recusal was not based upon known improprieties by the judge but that there was a "very real appearance and possibility of impropriety" (A. 292), deriving from the relationship of the former law clerk as active counsel in the court of his prior employer in a case in which he had had extensive participation as a clerk. Neither the trial judge nor the law clerk came forward with any disclosure or explanation of the circumstances surrounding the judge's letter to the clerk, nor was there any disclosure or explanation by the law clerk and his firm of the extent to which the law clerk had already participated in work of the firm on behalf of Fredonia in this case. Once RCA was confronted with the trial judge's direct communication about the case to his former law clerk and the clerk's appearance in court on behalf of Fredonia, RCA was entitled to a proceeding without fear of advantages to Fredonia. RCA candidly expressed its fears of the "very distinct advantage to Fredonia" (A. 292) in having the advice and counsel of a lawyer with the law clerk's experience and his knowledge and "feel" of the trial judge's innermost thoughts about the merits of this very controversy.

What Fredonia conveniently attempts to sidestep and what the court of appeals' decision correctly points out is that the *only* proper remedy in the event of disqualification under the unique circumstances of this case was recusal of the trial judge (569 F.2d at 255, 257):

Once it appeared that Fredonia might have an unfair advantage in the litigation because its counsel included a lawyer who had been exposed to the trial judge's

innermost thoughts about the case, the trial judge had no alternative to disqualifying himself.

• • •

Disqualification of counsel is a drastic measure and conceivably could have due process implications, especially when counsel has served throughout proceedings as involved and lengthy as these and the client's investment in legal representation is substantial.

The salutary ethical considerations which required the declaration of disqualification sought by RCA are well established and re-affirmed in the Opinion.\* No purpose can be served by this Court's repetition of these concepts. There is no more plain-spoken and unequivocal statement of the matter than Rule 7 of this Court:

No one serving as a law clerk . . . after separating from that position . . . shall . . . ever participate, by way of any form of professional consultation and assistance, in any case that was pending in this court during the period that he held such position.

Fredonia feebly argues that application of this rule in the district courts somehow will cause "havoc" in the judicial system of assigning cases. But RCA does not contend, and the court of appeals did not hold, that law clerks or their firms are disqualified from representing all their clients in the courts of the clerk's former employer. Rather what is prohibited is a law clerk actively representing a client in the same court where he had actually participated in the case as a clerk. In such rare situations, a non-prejudicial transfer of the case to another court where no dis-

\* 28 U.S.C. §455; See also Rule 4, Rules of the United States Court of Appeals for the District of Columbia (A-2); Rule 4, Rules of the United States Court of Appeals for the First Circuit (A-2); Volume 1A, Article 12, §8 State Bar Rules, Texas Revised Civil Statutes (Canon 9, Code of Professional Responsibility)

qualifying relationship exists would cure the disqualification altogether. Fredonia's argument improperly subordinates critical issues of the integrity of the judicial process to hypothetical claims of administrative inconvenience.

Moreover, Fredonia's argument ignores the accomplished fact in the present case of active participation by the law clerk in representing his client in the trial court and the unexplained communication between the trial judge and his former clerk about this case. There is no reason to suspect that vigilant counsel and courts cannot take such actions as are necessary to prevent similar situations before they reach the stage of an irrevocable taint on the fairness of a proceeding. The strongest policy consideration clearly is that ethical considerations should not permit a retiring law clerk to market his familiarity with a judge's thoughts about a particular case in order to obtain desired employment.

#### Damage Issues.

The court of appeals devotes part II of its Opinion to a thorough exposition of the basis in Texas law for actual and exemplary damages, and the proper measure of damages under governing Texas Supreme Court decisions; it also sets forth the items of damage which may be recovered on another trial by Fredonia under these governing Texas tests. 569 F.2d at 257-259. *Fredonia does not question the correctness of the Texas law of damages as declared by the court of appeals.*

Rather, petitioner's one paragraph concerning damages (Pet. 12) is essentially a complaint only of the absence in the language of the Opinion of verbiage that the errors in the trial court's charge were "harmful" or that they "resulted in an erroneous verdict."

In light of what the Opinion does say about the charge which was given, the evidence which was permitted to be introduced, and the elements of unallowable damage which were necessarily included as a result, petitioner's argument can only be fairly characterized as frivolous. Certainly such a contention contains no attraction to the standards for review on a writ of certiorari by this Court, as expressed in Supreme Court Rule 19 or otherwise.

Similarly petitioner presents no contention at all with respect to the court of appeals' remand for allowance of RCA's counter-claim as set forth in part III of the Opinion, 569 F.2d at 259-260.

#### CONCLUSION

Petitioner has failed to demonstrate that any of the independent grounds for reversal set forth in the decision below merit the exercise of this Court's discretionary review by writ of certiorari.

For the reasons stated, the petition should be denied.

Respectfully submitted,

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July 28, 1978

**CERTIFICATE OF SERVICE**

I, Marvin S. Sloman, counsel for RCA Corporation, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 28, 1978 the foregoing Brief in Opposition of respondent RCA Corporation was served on petitioner by mailing copies thereof by United States mail postage prepaid to Joseph D. Jamail, Esq., counsel for petitioner, at his office at 3300 One Allen Center, Houston, Texas 77002.

.....  
**MARVIN S. SLOMAN**

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF TEXAS

POST OFFICE BOX 330

TYLER, TEXAS 75701

February 21, 1974

CHAMBERS OF  
 WILLIAM WAYNE JUSTICE  
 JUDGE

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Re: Civil No. 5149, Fredonia v.  
 RCA, Tyler Division

Gentlemen:

The court has had before it for some time the defendant's motion for entry of judgment on its counter-claim in the above-entitled and numbered civil action. The court has delayed ruling on the motion in anticipation of a response from the plaintiff, but it cannot wait indefinitely. This letter is to inform you that the court will rule on the motion in ten days, in the absence of a response if necessary.

Very truly yours,

*W. Wayne Justice*  
 William Wayne Justice  
 U.S. District Judge

**Local Rule 4, United States Court of Appeals  
for the District of Columbia:**

No one serving as a law clerk or secretary to a member of this court or employed in any other capacity under this court shall engage in the practice of law while continuing in such position; nor shall he after separating from that position practice as an attorney in connection with any case pending in this court during his term of service, or permit his name to appear on a brief filed in connection with any such case.

**Local Rule 4, United States Court of Appeals  
for the First Circuit:**

No one serving as a law clerk to a member of this court or employed in any other capacity under this court shall engage in the practice of law while continuing in such position. Nor shall he or she after separating from that position practice as an attorney in connection with any case pending in this court during his term of service, or appear at the counsel table or on brief in connection with any case heard during a period of one year following separation from service with the court.